



**EG v Republic (Criminal Appeal E007 of 2025)  
[2026] KEHC 288 (KLR) (21 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E007 OF 2025  
DKN MAGARE, J  
JANUARY 21, 2026**

**BETWEEN**

**EG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of the trial court, Hon. Damacline Bosibori SRM, in Mûkûrwe'inî MCSO No. E002 of 2024, delivered on 17-01-2025.
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 18.12.2023 and 7.01.2024, at Matuto Village, Githi Location of Mûkûrwe'inî Sub-County within Nyeri County of the Republic of Kenya, intentionally and unlawfully caused his penis to penetrate the vagina of P.M.W., a girl aged seven (7) 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 are that on diverse dates between 18.12.2023 and 7.01.2024 at Matuto village, Githi Location of Mûkûrwe'inî Sub-County within Nyeri County, the Appellant unlawfully and intentionally touched the vagina of P.M.W., a child aged 7 years.
4. The Appellant was arraigned in court on 22/01/2024. The matter was referred to court number 2 for 23/01/2024. However, the charge was still brought on the next day before the same court. The charge was read, but it is not clear which language was used. He denied the charges. The appellant was released on 07.02.2024 for Ksh. 100,000/= with one surety of the same amount. He was supplied with witness statements and supporting documents.
5. The right to legal representation was indicated to be explained after a hearing date was fixed, 7 days later. Luckily, the appellant appointed an advocate for the hearing date.



6. The court heard sworn testimony from a total of five prosecution witnesses. The appellant was placed on his defence after the court delivered a lengthy ruling finding the prosecution witnesses credible and stating that it would convict if he remained silent. This is not the correct test. The court is entitled only to peruse the evidence and find whether a prima facie case has been established.
7. It is not true that, after a prima facie case, if an accused opts to remain silent, the court must convict. The prima facie standard is a civil standard. The court should and must be guided by the standard of proof in criminal cases. An accused person does not assume the role of proving his innocence. Rebuttal can be done through cross examination. The burden of proof remains in the state throughout the trial. In the case of *Republic v Abdi Ibrahim Owl* [2013] KEHC 2122 (KLR), Mutuku J posited as follows:

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution’s case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence... It is may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

8. It must be noted that the court cannot shift the burden of proof to an accused person except in very limited cases, for example, in a scenario in section 323 of the Penal Code or matters covered to a small extent in section 111 of the *Evidence Act*. The first of the sections provides as follows:

323. Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

9. The presumption of innocence remains, and the burden of proof is on the state. In the locus classicus and 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. Further reliance was placed on the case of *Sekitoleko v Uganda* (1967) EA 531 at p 533, where the legendary Sir Udo Udoma C J stated as follows:

As a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts, whether the defence set up is an alibi or something else. That burden always rests on the prosecution.



10. Further, the court erroneously used sections 306 and 307 of the Criminal Procedure Code. It is doubtful that the court complied with the requirements of Section 211 of the Criminal Procedure Code. It is unnecessary to address this issue at this point in view of the more poignant point raised herein.
11. Upon being placed on his defence, the Appellant, his cousin R and his grandfather testified as Dw1, DW2 and dw3. The court considered the prosecution's evidence, disregarded the defence evidence, and rendered the Judgement. The Court found the Appellant guilty and sentenced him to life imprisonment, with the sentence to run from the date when his bond terms were cancelled, 17.01.2025. He was informed of the right of appeal.
12. The Appellant, aggrieved, lodged this Appeal vide a memorandum of appeal dated 31-01-2025 on the following grounds;
  - a. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution witnesses had discrepancies in their statements and during cross-examination, raising a lot of doubts.
  - b. The learned Magistrate erred in fact by failing to appreciate that it would not be humanly possible to calculate the number of penetrations of sticks, fingers, and penis by an eight-year-old during defilement in four different times.
  - c. The learned Magistrate erred in law by failing to appreciate that criminal cases must be proved beyond reasonable doubt.
  - d. The learned Magistrate erred in fact by failing to appreciate that the medical record did not connect in the sense that the minor had a sexually transmitted disease, but the appellant was not tested to show whether he also had the disease.
  - e. That the learned magistrate erred in law by failing to consider the appellant's submissions before determining whether the applicant had a case to answer.
  - f. That the learned magistrate erred in fact by failing to consider that there were other family members present in the compound during the alleged acts as evidenced by the appellant's witnesses.
13. The grounds, except the fifth one, are similar to those set out in the original ground. The trial are only two sub-issues raised for determination
  - a. Whether the complainant was defiled during the material time, and;
  - b. Whether it is the accused person who defiled the complainant,
14. In essence, the appellant maintained that the prosecution did not prove their case beyond a reasonable doubt. Among other issues, he posited that the prosecution's evidence contained discrepancies in its statements and in its cross-examination. He also posited that the court did not appreciate that it would not be humanly possible to calculate the number of penetrations of sticks, fingers, and penis by an eight-year-old during defilement four different times. Further, the appellant alleges that the court did not appreciate that the medical evidence did not establish that the minor had a sexually transmitted infection. However, the appellant was not tested to show whether he had the same. He further asserts that the court did not consider the appellant's submissions and evidence before deciding the case.



## Submissions

15. The appellant filed submissions dated 27.10.2025. He submitted that the complainant had been warned by her mother to tell the truth before testifying in court. While such an admonition may ordinarily be considered normal and reasonable, the appellant argued that, in the circumstances of this case, it invites closer scrutiny. First, the need to prepare the minor prior to her testimony suggests an attempt to control or shape a particular narrative. Secondly, instructing the minor to “tell the truth” implies that she may be prone, or perceived to be prone, to dishonesty, thereby raising questions about her credibility. Thirdly, and this being the appellant’s principal concern, the minor’s response regarding the consequences of not telling the truth was troubling: she stated that when she lies to her mother, she expects to be beaten. According to the appellant, this response raises the possibility that the minor’s testimony may have been influenced by fear of punishment rather than a free and voluntary recollection of events.
16. They submitted that it follows from the above that the minor was under instructions to tell the truth lest a punishment would ensue. The issue in these submissions will then be, whose truth (narrative) was she prepared to tell? It would appear that from *voire dire*, the trial court reached a conclusion that the minor may not have understood the value of the oath.
17. They submitted that PW1 opened her testimony by placing the locus as “Kiahungu” contrary to “Matuto” found in the charge sheet. While acknowledging the main residents of her environment, she is intrigued to state that, concerning the appellant, she did not know whether he studies or works. Despite her impressive “eloquence,” she insists she transferred to her new school while in grade 2, contrary to the evidence of PW2 and PW3. They questioned her testimony that, when examined concerning the appellant, she stated she had gone to visit her grandfather on 18.12.2023, when the appellant wronged her. Yet the evidence is that she had been resident there for a number of years. Pressed further about being “wronged” by appellant, she testified that appellant beat her with a stick until she started crying. Stating further that the appellant later inserted a stick into her private part, besides using his forefinger and then his penis.
18. It was submitted that although the complainant appeared remarkably composed and detailed in her testimony, purporting to clinically demonstrate the number of times various objects were allegedly used and even recalling the clothes and colours worn on the material dates, such detail was incongruous with the charge sheet. Counsel argued that neither the main nor the alternative charge specified the use of fingers or a stick as instruments of the alleged assault, raising the question whether the prosecution itself doubted that aspect of the complainant’s account.
19. Further, it was submitted that the complainant’s evidence was riddled with inconsistencies. Whereas she initially testified that no one else was present at the homestead on 18.12.2023, she later stated that one B(a minor) was outside playing with another cousin. She further testified that the incident was not isolated and introduced additional alleged dates, namely 01.01.2024, 06.01.2024, and 07.01.2024, which were not clearly anchored in the charge sheet. It was contended that these inconsistencies and omissions went to the root of the prosecution’s case, thereby undermining its credibility and significantly weakening its probative value.
20. It was his submissions that the prosecution’s evidence was Med by material inconsistencies that weakened its credibility. The fact that PW1 was able to outpace PW2 as they left the church was difficult to reconcile with the evidence of PW2 and PW3 that the minor could neither walk properly nor sit. PW1 also testified that on 07.01.2024, she went out to play with her cousins, a circumstance that cast doubt on the allegation that she had already been sexually abused.



21. PW1 stated that it was on 08.01.2024 that PW2 noticed she was not walking properly and questioned her, leading to the alleged disclosure. However, PW1 never testified that she had any difficulty walking during the alleged incidents. Further contradictions emerged on how the disclosure was made. PW1 claimed it occurred in the morning, while PW2 testified that it was later in the day, after she noticed an unusual smell and decided to bathe the minor. These divergent accounts were irreconcilable.
22. It was further submitted that PW2 claimed to have observed wounds, dirt, and discharge in the minor's vagina, yet no immediate medical or police action was taken. Despite allegedly making these observations on 08.01.2024, PW2 only sought medical attention the following day, for tonsil and common cold, and no satisfactory explanation was offered for this delay. Counsel argued that, apart from an allegation that the appellant had bought PW1 an apple, there was no clear or cogent incriminating evidence linking the appellant to the alleged offence.
23. He submitted that the court further noted the difficulty of attributing precise dates of assault to a child of tender years. PW2, as the recipient of the first report, failed to give a coherent account of what the minor told her and how the appellant was implicated. In the absence of a clear first report and given the contradictions between PW1 and PW2, a critical link in the prosecution case was missing, leaving the evidence wanting. Reliance was placed, *Michael Muriithi Kinyua v Republic* [2002] KECA 315 (KLR), where, it was alleged that the court emphasized the need to take into account the first report. Underscoring its importance in safeguarding a true account of what happened before the influence of others and other reflections have set in.
24. It was their submissions that the minor was finally taken to Mûkûrwe'inî subcounty Hospital the next day, 10.1.2024. Curiously, an allegedly critically ill patient, instead of being treated/ examined, was first referred to the police station to file a report. An a priori conclusion of sexual assault seems to have been drawn. Be it as it may, she was thereafter attended to and treated. PW1 evidence is that she received 4 jabs and medicine. The minor concludes that she was not present when the appellant was arrested, whereas PW5 testified that it was the minor who pointed out the appellant.
25. Finally, it was submitted that, in outlining the prosecution's case in the judgment, the trial magistrate appears to have misdirected herself on the facts. She thereafter embarked on an analysis of the issues for determination and an exposition of the applicable law from a standpoint that, according to counsel, reflected a pre-formed conclusion. It was contended that the trial court adopted an exclusionary approach aimed at sustaining that conclusion, thereby eroding the fundamental safeguard of the presumption of innocence. In effect, counsel argued, the burden of proof impermissibly shifted from the prosecution to the accused, requiring the appellant to disprove the case against him. It was thus submitted that the trial court undertook a theoretical or abstract inquiry, rather than a strict factual evaluation of the evidence, in arriving at a finding of guilt.
26. The appellant further submitted that the trial magistrate appeared to have put the cart before the horse by effectively finding that the offence was proved before considering the defence. The defence evidence was only touched after the conclusion, only to demonstrate its perceived implausibility in light of an already-reached finding of guilt. It was contended that this misdirection impaired the court's ability to critically analyse the evidence and objectively arrive at the conclusion it did. Counsel argued that the judgment discloses elements of confirmation bias, which prejudiced the appellant in that his defence was not subjected to an impartial and balanced consideration.
27. On the whole, neither the fact of defilement nor the guilt of the appellant was proved beyond reasonable doubt. It is our submission that the case was contrived through PW2, who felt there was something more to the cold. She discovered an injury to the minor's anus. The court notes that the medical evidence was that there was no injury to the anus.



28. PW3 further interrogated and prodded the minor to believe she had been abused. She built and maintained a case around these suspicions. Consequently, she fixed it on the appellant, and the prosecution and the trial court swallowed it hook, line, and sinker.
29. On their part, the Respondent filed submissions dated 6.10.2025 and maintained that the appellant was correctly sentenced. 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. 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 sub-issues, namely:
- a. Proof of Penetration
  - b. Proof of Age of the victim.
  - c. Identity of the perpetrator.
30. They submitted that the complainant, though of tender years, gave a clear, consistent, and coherent account of the events. It was contended that she explained how the appellant would call her, lead her to his house, take her to the bedroom, and direct her to lie on the bed, after which the alleged act occurred on several occasions.
31. On proof of age, reliance was placed on the case of *Kaingu Elias Kasomo v Republic*, C.A. Cr. App. No. 504 of 2010; where they stated that the court of appeal stated that, "age is a key ingredient to the offence of defilement and failure to prove it amounts to failure to prove the offence beyond reasonable doubt."
32. They submitted that, in her evidence, the minor stated that she was seven years old. The complainant's mother identified a birth certificate indicating that the minor was born in January 2016. The medical report recorded the minor's age as eight years at the time of examination, while the Investigating Officer produced a birth certificate showing that the minor was seven years old at the time of the incident. It was therefore submitted that the age of the minor was proved beyond reasonable doubt and was not contested by the appellant.
33. On the identity of the perpetrator, it was submitted that the appellant and the minor were well known to each other, being maternal cousins who shared grandparents and resided within the same compound. Given their close familial relationship and the minor's description of the appellant's house layout where the alleged offence occurred in broad daylight, it was contended that there was no possibility of mistaken identity.
34. They also addressed a sentence, stating that the sentence was appropriate. They cited section 8(1) (2) of The *Sexual Offences Act*, which provides that "a person who is found guilty of the offence of defilement with a child aged 11 years or less shall, upon conviction, be sentenced to imprisonment for life. According to the Respondent, the trial court handed down an appropriate sentence as prescribed by statute". They went ahead nevertheless and relied on the case of *S V Malgas 2001(!) SACR 469 (SCA)* at para 12 where it was held that:

A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.....However, even in the absence of material discretion, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence



which the appellate court would have imposed had it been the trial court is so Med that it can properly be described as “shocking”, “Startling” or “disturbingly inappropriate”

They also cited the case of Shadrack Kipkoech Kogo –vs- R, Eldoret Criminal Appeal No. 253 of 2023 where the court of Appeal stated that, “ Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a very wrong principle was applied or that short of these , the sentence itself is so excessive and therefore an error of principle must be interfered.”

Finally, they also relied on the case of R –VS- Joshua Gichuki M petition no. 18 of 2023 where the supreme court was clear that, “Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law”. The court was categorical that mandatory sentences are not unconstitutional, “it should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution.”

35. The court was accordingly urged to dismiss the appeal, it being contended that both the conviction and the sentence were proper and lawful.

## Evidence

36. The trial court conducted a voire dire examination and found the complainant unsuitable to give sworn testimony as she did not understand the nature of an oath. She therefore testified unsworn and was cross-examined. She stated that she was eight years old, a Grade 3 pupil at MAA School, and ordinarily lived with her mother at Kahawa West, where she also attended church. She went to visit the grandparents in 2023; on a date she could not recall. She recalled that on 18.12.2023, she was staying at her grandparents’ when E did something wrong to her.
37. She was in her homestead in Kiahugu village, where several relatives, including the appellant, resided in separate houses within the same compound. The houses were between 10m to 50m apart. The appellant was his cousin. The appellant stayed with DW2. DW3, her grandfather lived 10 m from their house.
38. A girl by the name M came to their home and was escorted by the grandmother. The appellant lured the minor inserted a stick a size of Bic pen, a finger and then, a penis. Another minor, B, 3-year-old, was playing outside. On 1.1.2024, the she went for onions, when appellant again lured the minor inserted a stick a size of Bic pen, a finger and then, a penis.
39. Another date, 6.1.2024, R left to collect milk, when the grandmother went to a burial. R left at 9.00 am again appellant lured the minor inserted a stick a size of Bic pen, a finger and then, a penis.
40. On 07.01.2024, she attended church with her grandmother and later played within the compound. She stated that the appellant gave her an apple and later called her to his house, where another incident allegedly occurred during the day. As with the previous occasions, she stated that she was instructed not to inform her grandmother and initially remained silent.
41. She testified that she later began experiencing pain, difficulty walking, and discomfort when using the toilet. She eventually disclosed the alleged incidents to her grandmother, who later took her for medical attention. She was examined at fya Bora clinic and given medicine. The following day, the patient was taken to Múkúrwe’ini hospital by the police and examined. She maintained that her testimony was truthful and that she had not falsely implicated the appellant. She maintained that he hit her in her



- vagina using a stick four times, then inserted his index finger into her vagina and inserted the stick again. The appellant then removed his clothes and inserted his penis into her vagina four times. He had worn a red T-shirt and white trousers.
42. She stated that she left her grandmother's living room because there was no one else at her grandmother's home. Her grandmother returned at 3 pm, cooked the food, and she ate. She went to play with B (a minor) and C (a minor). She did not alert anyone about the incident.
43. On cross-examination, she stated that on 7/1/2024, on a Sunday, she went to church with her grandmother at Matuto area. The appellant had been sent by her grandfather to purchase medicine. After church, the minor ate and took a nap. She later woke up and went to play outdoors with B (a minor) within the compound. C (a minor) was showering. The appellant brought her an apple, which she ate. Grandmother asked him to harvest firewood, but he declined. she told him that the grandmother had instructed her not to eat. He asked the minor to serve him food, but she declined because of her grandmother's instructions. She went back to the house and slept. The appellant served himself and ate. She stated that her grandmother asked about who had eaten the food, and she told her it was the appellant.
44. Later, the appellant called her, and she went to his house to the bedroom. She asked her to lie on the bed and undress which she did. She had worn a white top, a green t-shirt, brown trousers, and black innerwear. She removed the trousers and innerwear to ankle length. The appellant had a pair of white trousers which he also removed to knee level together with his brown underwear. He hit her thrice below the tummy using a stick the size of a bic pen where she urinates from. She felt pain then he inserted his right index finger in her vagina. He also inserted the stick later into her vagina. He inserted the stick once, the penis thrice and the finger thrice. He then asked her to dress up and not to tell her grandmother. The incident occurred during the day and she did not inform her grandmother as she was instructed.
45. On cross-examination, she stated that on 18/12/2023, M visited home at 8 am and her grandmother escorted her at 2pm. She opened school on 8/1/2024 for that term. She confirmed that C (a minor) and B (a minor) are her cousins. B (a minor) was 3 years old while C (a minor) was 10 years old. She recalls that when M visited her grandmother had left for work. R was also away. C (a minor) was at home during the subject time. She recalls that during the first incident she wore a pink trouser and a blue t-shirt. Her grandmother used to do her laundry. She stated that the appellant used to hit her and insert fingers, sticks and penis each time. She used to bleed and would dress up and her grandmother would do her laundry. She confirmed that the stick was the size of a bic pen. The appellant would collect sticks as they headed to the scene each time. During the first incidence the appellant wore a black trouser and a blue t-shirt.
46. She testified that she had three uncles. On 01.01.2024, her uncle RM visited. She stated that she was wearing a black skirt and white t-shirt, while E was in blue trousers and a black t-shirt. Her grandmother had gone to borrow some onions around 10:00 a.m., even though she had some on her farm. The minor stated that the appellant committed the alleged act at approximately 9:00 a.m. She did not scream, even though her grandmother was nearby, because the appellant warned her not to tell anyone, particularly her grandmother, or he would punish her.
47. She further stated that on 06.01.2024, the minor's grandmother went to attend a burial. The appellant visited the house while the minor was with C (a minor) in the bedroom and asked her to follow him. She stated that in her recorded statement on the same date, she had indicated that the appellant asked for food, but she declined, noting that only leftovers from the previous night remained. She further



- testified that the appellant served all the food. She stated that when her grandmother went for the burial, her grandfather, M, R, C (a minor), and B (a minor) were at home.
48. On 7/1/2024, she left for church with her grandmother. She then took a nap on the seat. Her grandmother also took a nap. On Sundays, they attend church. The appellant was to fetch firewood on Sunday. He had left to purchase medicine for her grandfather. She stated she was taken to the hospital at Ichamara on 8/1/2024 due to fever and a common cold. She stated that R and M do not reside with E. R's house is near E's. M does not reside at home. She stated that R used to be in the living room so he could not have heard her being defiled. She confirmed that she is the one who alerted her grandmother about the defilement. She had noted that the appellant bought medication on Sunday. He wore black trousers and a blue T-shirt. She stated that she studied in grade 1 at her grandmother's home, but attended grades 2 and 3 in Nairobi. In 2023, she was studying in Nairobi.
  49. The court noted the demeanor of the minor as soft-spoken and would take a long time to respond, but was consistent and maintained eye contact.
  50. PW2 was JWG, a grandmother of the complainant and the appellant. The complaint was born on 12.1.2016. The appellant was born in 2004. The minor attended MTP in Nyeri, and the appellant attended for 2 days. On 6.1.2024, she left home for a burial at Gathukimundu area. She found all the grandchildren were okay and then cooked. The complainant had a common cold and fever. She was given a syrup, and the witness continued monitoring her until 4 am, when the complainant slept. The following day they went to church. She refused to remain behind. They left for mass at a nearby catholic church. The complainant did not eat well and walked with legs apart. She saw redness in her anus. She did not examine the vagina. She bathed her and did not examine the vagina. She did not allow her to go to school. On Tuesday she was plaiting her hair. The minor went to the toilet and had a foul smell. The minor had a dirty vagina and wounds.
  51. The witness testified that the complainant could not shower as she was feeling pain. She wiped the vagina and applied jelly. The complainant told her that the appellant bought her an apple and told her not to tell the grandfather. she dressed the appellant in different clothes and went to sleep. She went to E and R's house and asked him to call E. She asked them to go to her house while her husband was watching news. The witness asked the appellant and R, who denied being aware of the incidence except purchase of sweets.
  52. She was taken to Afya Bora Clinic at Ichamara at 1500 hours. the doctor declined to treat her and referred her to Mûkûrwe'inî hospital. She was given Panadol's only. Later they went to Mûkûrwe'inî hospital where they were referred to Mûkûrwe'inî police station. The appellant was arrested. DW3 was called to the police station. She was not aware of the grudge between the parents of the two children.
  53. On cross-examination, she stated that the complainant slept on the couch after the 11:00 AM mass. The minor had been defiled several times before. She did not tell the witness on Sunday that she was defiled. The complainant did not report the incident to her. The minor could not walk well.
  54. She stated that her clothes were dirty and blood-stained. On Monday, 8.1.2024, she stated that she was being sent E's money and did not embezzle the same. She did not fall out with her daughter, the appellant's mother. She denied having disputes with Mama E over the money she promised to send in December 2023. She saw redness on Thursday, but saw wounds on Monday, 8.1.2024. She stated that the complainant transferred to Nairobi in 2024. She stated that she plants onions but asks her neighbours for the same, when it is dark.
  55. PW3 was the complainant's mother. It was her testimony that the minor was born on 12.1.2016. She stated that PW3 is her mother, and the appellant is her sister's son. She was alerted on 8.1.2024 about



- the cold and tonsils, and purchased medicine, which was sent via courier. She kept phoning every day. The following day, PW2 told her the complainant had a fever, headache, and abdominal pain, and she was advised to go to the hospital. A medic refused to treat her. She later met the complainant and PW2 at Mûkûrwe'inî hospital. The minor was examined and treated. They recorded statements. She admitted that she and the appellant's mother had a fallout, but not on serious matters. They last fell out two years ago.
56. She stated that PW1 was taken to the hospital because of tonsillitis and a common cold and not because of defilement. They did not fight because the appellant's mother denied PW2's maternity to PW3. On 8.1.2024, PW2 told PW3 that PW1 was to go to school as she walked well. She was allegedly defiled 4 times, including on 7.1.2024.
  57. On re-examination, she stated that she was not present when the incident occurred. She denied ever trying to seduce the appellant's mother's husband (the appellant's "father").
  58. PW4, EN, produced a P3 form, PRC, and a laboratory request form completed by Mercy Njeri, a clinical officer. Clinical notes dated 10.01.2024 recorded that the minor complained of sexual assault occurring between 18.12.2023 and 07.01.2024. Observations included a black spot on the vaginal swab, reddish inflammation of the labia majora and minora, difficulty in sitting, and whitish vaginal discharge, with the hymen noted as old broken. The alleged perpetrator was identified as an 18-year-old cousin from Mutito area of Mûkûrwe'inî. On physical examination, the minor's general condition was reported as normal except for the vaginal discharge; the anus appeared normal. It was noted that the minor had been allegedly assaulted on multiple occasions. At the time of examination, the minor had bathed and changed clothes, and no external physical injuries were observed. The vaginal findings were described as consistent with prior penile contact, and the discharge was noted to be foul-smelling.
  59. On cross-examination, he stated that after a week, the hymen is not freshly broken. The epithelial cells are not captured in the reports and are present at the site of injury. He stated that since epithelial cells were not covered, there may or may not be injuries. The medical reports did not connect the appellant to the offence in the absence of spermatozoa. The whitish discharge is associated with a fungal infection that can be sexually transmitted. It was her case that the hymen could be broken by means other than a penis. He indicated that sticks were not indicated. There was a temperature fluctuation between PRC and P3, but only the author can explain the difference.
  60. PW5 was PC(W) Priscilla Cherop of Mûkûrwe'inî police station. She was assigned this case on 10.01.2024, being the defilement of a seven-year-old minor. She stated that PW3 had reported that the minor went to church and kept sleeping, but she took no steps. The minor did not go to school on Monday, and the grandmother decided to prepare her hair in preparation for Wednesday. She felt a foul smell from the minor and bathed her. She inspected the vagina and noted discharge from the private parts.
  61. She learnt that PW2 took the minor to Afya Bora clinic, which refused to treat and referred the minor to Mûkûrwe'inî. They first went to Mûkûrwe'inî police station to report before going to the hospital. The witness escorted the minor and PW3 to the hospital. The minor was treated as an outpatient. They were told that the appellant was defiling her from 18.12.2023 to 7.1.2024. He learnt that the appellant took the minor on 18.12.2023 when the grandmother was with a guest and took the minor to his room, inserted sticks into her vagina and defiled her.
  62. On 1.1.2024, PW2 had gone to borrow onions when the appellant took the minor to the bedroom and defiled her. On 7.1.2024, the appellant was sent to the shopping centre, came back with an apple, and defiled the minor. The witness visited the scene, where the minor identified the appellant, which led to his arrest and subsequent charging.



63. On cross-examination, she stated that PW2 attended the burial on 6.1.2024. The minor did not tell anyone else about the incident, and three others. She did not expect the minor not to recognise the cousin. She was questioned about the date she recorded her statement.
64. The court found the appellant to have a case to answer and relied on irrelevant sections of the law.
65. The appellant gave sworn evidence. He stated that he was an 18-year-old student in a local secondary school. He stated that he stayed with RM, a cousin. He does menial jobs during school breaks. On 18.12.2023, he left at 7.00 am, went to Kimondo's village in M's home, worked from 8.00 am harvesting coffee, and left at 5 pm. He showered and relaxed. On 31/12/2023, a friend, WM, invited him to the end-of-the-year party at Ichamara. He went to his parents' home at Kimondo area and later attended Kesha until 5 am. He returned to the grandparents' home on 2.1.2024 between about 3.00 pm and 4 pm. On 6.1.2024, he went to pluck coffee with RM. The grandmother went to a funeral at the same time as when the appellant and R left for coffee picking.
66. They came back later, when the grandfather sent her for medicine, as P was not feeling well. The appellant bought medicine for the tonsils and the common cold. He came back in the evening, ate, and slept. On 7.1.2024, a Sunday, the complainant and PW3 let for church.
67. The grandfather came back at noon, and PW1 and PW3 at 1 P.M. PW3 told the grandfather that PW1 was not feeling well. The grandfather sent the appellant for Panadol and cabbage as the complainant indicated she was feeling pain. The appellant and R left for a barber shop and came back at 6 pm. They went to visit a neighbour and came back at 8pm. They found the complainant and the grandparents. On 8.1.2024, he left for work with RM at 7 am, returned, and relaxed. The grandmother had cooked, they ate, and went to sleep. Before they slept, the grandmother summoned R and told him that PW1 had told her that the appellant had defiled her.
68. R indicated that this was impossible as PW3 was almost always with PW1. He indicated to the duo that he was willing to be examined but he was not subjected. He stated he was a bright student and had been staying with his grandmother since class three. The grandmother kept telling the appellant that she could not assist the appellant as a mother. The grandmother, used fees for the appellant to pay for PW1.
69. On cross-examination, he said he knew the complainant, who was his cousin. He stated that at first, he was not at home as he was occupied elsewhere. He stated that PW1 had no reason to fix him. He was not cross-examined on any of the other alibis and evidence he gave. On re-examination, he stated that the investigating officer did not conduct a thorough investigation. He denied defiling the minor.
70. DW2 was RM of Kirerema area and aged 18 years. He stated that they stayed with the appellant, the grandmother, PW3, Mother, W, brother A, and cousin A and MM. The complainant used to live with them but has since relocated to Nairobi. He stated that he was in form 4. They engaged in casual work picking coffee. He stated that on 18.12.2023, he left home with the appellant to pick coffee, after leaving home at 7 am to reach work at 8.00 am.
71. It was his evidence that they worked the whole day and returned in the evening. They showered and relaxed. The appellant never left the accused's side at any moment. They worked at a friend's home and hung out together thereafter. WM invited them for the end-of-the-year party. The witness went home after the party, while the appellant left for his father's home at Kimondo, as they had not seen each other for a long time.
72. He came back in the evening on 2.1.2024. On 1.1.2024, the witness was with the grandparents and PW1. The appellant was not at home on the said date. On Saturday, 6.1.2024, they went to till the



- land for pay. They left at 8.00 am, and their grandmother left for burial. The complainant was left with the grandfather. They came back in the evening. The appellant relaxed with the grandmother and PW1. The witness was splitting firewood. The grandfather alerted the grandmother that PW1 was unwell. The grandfather gave the appellant money to buy drugs for tonsils and the common cold. The appellant returned, ate, and went to sleep.
73. On Sunday, the grandparents and PW1 attended church while DW1, DW2, and M remained at home. When they came back from church, the grandmother told the grandfather that the sickness was getting worse. The grandmother fixed lunch, which they heartily consumed. A friend, W, came to visit the appellant and DW2. DW1 and DW2 escorted him, DW3 gave DW1 money to buy medicine and baggage. They passed by a barber shop as schools were about to open. They again stepped out and returned late at night.
74. The grandmother and the mother of the complainant, that is, PW2 and PW3, were conversing about how they were to spend this money. He did not understand what they meant until later. They later learnt that the appellant's mother had been compensated for a road traffic accident, so it is the money they were referring to.
75. The grandmother summoned the appellant and DW2 and accused the appellant of having defiled PW1. They denied the allegations and stepped out. On 7.1.2024, the witness and appellant stayed together throughout.
76. On cross-examination, he stated that DW1 and PW1 were his cousins. He was with the appellant on the said dates throughout. They were together, even for parties. The grandmother threatened to have the witness arrested if he assisted the appellant. He stated that the appellant was framed by the grandmother.
77. He stated that on 6.1.2024, the complainant was unwell, and the grandmother sent the appellant for medicine. He was not aware of any injuries to PW1's private parts. He said that there was nothing stopping the grandmother from fixing the witness. He stated that the grandmother wanted to spend the appellant's mother's money on a re-examination. He stated that the police did not ask him if he thought that the appellant was the culprit.
78. DW3 was an 80-year-old grandfather of both the complainant and the appellant. He stated that he had three children with PW3 as his wife. He stated that he was staying with his grandchildren, the appellant, DW1, DW2, JW, and MM. He stated that on 6.1.2024, PW3 attended a burial at Gathukimundu. He was unwell but gave PW3 Ksh200/=. He stayed at home with J, a toddler. W was present; she is older than J. She has since relocated to Nairobi. DW1 and DW2 had gone to pluck coffee in the Kimondo area, and MM had gone to visit an aunt in Nyeri. DW1 and DW2 get back at 8 pm. The minor had a throat problem, and the witness sent the appellant for medicine.
79. On 7.10.2023, the minor was well, hence they left for church with PW3. They left the church at 1 pm and arrived at 2 pm. The complainant complained of a headache. DW1 and DW2 had a friend whom they escorted to a barber to get a shave and to buy Panadol. He remained with PW1 and PW3. DW3 was watching TV in the living room while PW3 was washing utensils. DW1 and DW2 came back at 8 pm. They had dinner at 9 pm. The complainant dozed off and was taken to bed by PW3 after medication. They left for the bedroom. The witness did not leave the living room after he left the church.
80. The child's health deteriorated and was taken to the hospital the following day, and came back at 5 pm. The minor was given medication and even started playing. PW3 told DW1 and DW2 that DW1 had defiled the minor. The appellant dared her to take him for examination. DW2 indicated that he was with DW1, even at night. The appellant cried while the witness proposed that the appellant be



tested. The next day, PW3 went to the hospital without alerting them. The appellant's mother was summoned and went to the station. The appellant was arrested on Thursday. DW3 stated that he was staying at home for years. He has had hypertension for years. He stays at home and tends to his coffee. He stated that during the period, the appellant and complainant were not left alone at home.

81. On cross-examination, he stated that the appellant and complainant were his grandchildren. He maintained that the appellant did not stay at home during the material time. He stated that they did not visit the police station as he was unwell. He just walks around the homestead. He purchased medicine for the complainant as she was unwell. He could trail the minor if he went to the accused's house.
82. On re-examination, he maintained that the appellant was never alone with the complainant, and he worked the whole day. He stated that the two children could visit the appellant's house, but that he would supervise them.

### **Impugned Judgment**

83. The court analysed the evidence and delivered a long judgment. The court relied on the finding that the age element had been proved. She set out the facts again and concluded that penetration was proved. The court set out a record 18 issues to be determined; however, scrutiny reveals that they are not issues but self-evident statements whose answers lead to a single conclusion. The court found that the evidence was not disputed by the appellant, who only disputed culpability.
84. The court found that the complainant's evidence was candid. The court placed reliance on section 124 of the [Evidence Act](#). The court dismissed the appellant's request for an examination to disprove culpability. Reliance was placed on the case of *Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010*, where it was held as thus:

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the [Evidence Act](#), Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.”

### **Analysis**

85. This being a first appeal, this court is under a duty to reevaluate 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 firsthand. 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.

86. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation 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.

87. The legal burden is the burden of proof is on the prosecution and remains constant throughout. According to established principles, burden of proof 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.

88. Brennan J, addressed the standard of proof required in Criminal cases the case of *Re Winship* 397 US 358 {1970}, at page 36164 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.

89. 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.

90. 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.

91. 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 reevaluation of the case.
92. 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. The caution has regard to the nature of criminal offences, whose consequences extend beyond the individual to society at large. A conviction and sentence as a sexual offender carries a lifelong stigma for the accused. It also leaves indelible scars on the victim. conviction must thus be justified based on indisputable evidence given to the required standards. This is what the former Chief Justice Mohamed of Namibia had in mind in addressing sexual offences in *S v Chapman* 1997 (2) SA CR 3 (A) at 55:

'Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of *the constitution* and to any defensible civilization.

## The Law

93. The law under which the appellant was charged is provided under Section 8 of the *Sexual Offences Act* as hereunder:

8. A person who commits an act which causes penetration with a child is guilty
- (1) 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) .....
- (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.

94. On the other hand, the appellant was charged with an alternative count under Section 11 of the *Sexual Offences Act*, which 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.

95. 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}.

96. 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 *E 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.

97. While addressing the question of age of the victims in the 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.

98. The age of the minor is relevant to the extent that it is to make a distinction between those aged 18 and under 18. If, for any reason, it is proved that a person is a child under the age of 18, but there is a difference in respect of whether the child is 7 or 8, then such a difference is irrelevant. Where the age flows into the next age for purposes of the offence, an acquittal cannot follow. The offence of defilement is complete upon proof that a person is under the age of 18. The actual age is required only when the court is considering, for purposes of sections 8(2), 8(3), and 8(4). The Court of Appeal in the case of *Stephen Nguli Mulili v Republic* [2014] KECA 408 (KLR), addressed this aspect as follows:

In the case of *Kaingu Elias Kasomo V R, Malindi CR. NO. 504 OF 2014*, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

However, as the Court clarified in *Tumaini Maasai Mwanja V R, MSA CR.A. NO. 364 OF 2010*, proof of age for the purpose of establishing the offence of defilement, which is committed when the victim is under the age of 18 years, should not be confused with proof of age for the purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.

99. It is only when there is evidence of doubtful origin that 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 determine the age of the victim in the absence of any other evidence. Apart from Medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.

100. The appellant was a grandfather and a person who is related to such child within the prohibited degrees of blood or affinity within section 8(8) of the *Sexual Offences Act*. The minor's age is within the appellant's knowledge; he did not dispute the age on cross-examination. The medical evidence and birth certificate show that the minor was 8 years old. The minor was below 18 years. Hence, the age was proved for defilement. For punishment, the age of 8 years was proved. It is irrelevant, for both conviction and sentence, whether the minor was 7 or 8 years old. The distinction is immaterial.



101. The medical evidence showed that there was an old, broken hymen. It does not of itself show penetration. However, there were no epithelial cells which meant there was no indication of injury. Thus, the court must examine the surrounding circumstances to determine whether there was indeed defilement.
102. The next question is whether there was evidence to prove the appellant's guilt. It is settled that circumstantial evidence must be inconsistent with an 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.
103. The threshold as stated in *R vs Kipkering Arap Koske* [1949] 16 EACA 135 is that such evidence must exclude coexisting 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 coexisting 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.
104. Before proceeding, it is noted that there are certain aspects of the judgment that are indefensible. The first evidence to consider is that of the grandparents and MM. The grandmother decided on the date that she learned that the minor was defiled, to check all places, the anus. It is a matter of general notoriety that she will not have examined the anus without seeing blood in the vagina, if there was any.
105. DW3 was categorical that he was at home throughout the period. This piece of evidence was not impeached. The second piece of evidence was that of DW2 that they were going out during the period. The court was plainly wrong to dismiss the entire defence evidence as alibi evidence.
106. What I understand DW1 explaining was that he lived a normal life, going to work and back. This was corroborated by the two defence witnesses and, in an uncanny way, by PW3. I find and hold as true that DW1 and DW2 were always together. This was also so in the prosecution case. DW3's evidence was consistent and unshaken as recorded. He is an 80-year-old who was grounded at home. As per PW1, DW3's house was 10 m from the appellant's house. He could have heard any kind of noise from the minor.
107. The other disturbing part of the judgment is that after lamenting and setting out several authorities, the court found that there was penetration and the appellant was positively identified. The court again set out a series of facts from the previously summarised evidence and, without more, concluded that



the case was proved. After finding the appellant guilty, she considered the appellant's defence. She had even concluded the findings on the alternative count. It is not necessary to set out what the court said regarding the defence evidence, since it was made after the concession and the finding of the last element.

108. In the context, the court found, in paragraph 27 of the judgment, that the last element of the offence was proved. The court then proceeded to address the defence in paragraph 28. The court treated the defence evidence as allegations, while the prosecution's evidence as cogent evidence.
109. The court disregarded disparities because they were not raised at trial. The court also found gaps in the prosecution's case but disregarded them as minor. The court further placed the burden of proof on the appellant to disprove the disparities. The court will not address conduct of this nature, as the last time it addressed such wrongs, the court wrote a 100-paragraph protest letter to the court. It will not be the duty of the court to redeem this particular court in view of its inability to comprehend and understand the protections given to an accused person.
110. By failing to consider the defence evidence and blatantly disregarding the defence evidence, the court fell into an irreversible error. The danger with such errors is that potentially guilty people may be released due to mistakes not expected from a court handling such delicate matters. A court cannot disregard evidence or submissions. It has to analyse it before dismissing it or finding that it does not affect the guilty or otherwise. This is the essence of the right enshrined under Article 25 of *the constitution* as follows:
- Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-
- (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;
  - (b) Freedom from slavery or servitude;
  - (c) The right to a fair trial; and
  - (d) The right to an order of habeas corpus.
111. Therefore, a hearing before a court that does not even hide its bias is anathema to a good conscience and the values that underlie an open and democratic society based on human dignity, equality, equity and freedom justice shall be administered without undue regard to procedural technicalities; and offends the purpose and principles of this Constitution, which Article 159 of *the constitution* places on the judiciary to protect and promote.
112. The second aspect is an alibi defence. The appellant raised an alibi defence in respect of 31.12.2023 and part of 1.1.2024. after raising the alibi, he went on to present evidence from DW2 and DW3. Their stories appear to have a natural flow and were not contested. When placing an alibi defence, an accused does not thereby assume the duty to prove the same.
113. The one issue that the court failed to address critically was the evidence in defence. The court summarily dismissed the defence of alibi. It is true that in certain cases, an alibi needs to be set out early. However, the duty to prove the falsity of an alibi still remained with the prosecution. The appellant, as an accused, has no duty to help the state prove its case, as he remains innocent until proven otherwise. The accused was arraigned and denied the charges. A plea of not guilty was consequently recorded. 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.”

114. If evidence was tendered that was surprising to the state, they had a chance under section 212 of the Criminal Procedure Code to call for rebuttal evidence. the section provides as follows:

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

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

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

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: “If you rattle a snake, you must be prepared to be bitten by it.” ...



We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words, there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the *Civil Procedure Act*, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:

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

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

116. The appellant was not under duty to disclose his defence before being put on the defence. In any case, the State has a chance to call rebuttal witnesses. The case for the appellant from the cross examination was that he was not there. It used to be the position that alibi had to be disclosed in advance. However, non-disclosure is not fatal.
117. Further, the prosecution failed even to record evidence of the defence witnesses and MM. All witnesses indicate that he was present. The state failed to call him when the prosecution's case had gaps, as the court rightly found, though it reached a different conclusion. This was a cousin of the complainant and could have shed some light. Failure to call him must, as a corollary, be construed that had he been called, his evidence would have been adverse to the prosecution.
118. Further, there was W(a minor) who was always present with the complainant. Why was she not called? Failure to call DW2, DW3, W, and MM must be construed adversely to the prosecution. Indeed, when the duo, DW2 and DW3 gave evidence, they posited that PW3 and PW2 were responsible for framing the appellant. It is not understandable on what kind of investigations the state carried out when the people who were permanently in the locus in quo were not questioned. DW2 gave insight on what he heard, his own grandmother conspiring her daughter to use the minor to extort the appellant's mother. It came out in evidence that PW2 was interested in her sister's husband and her money.
119. The Appellant's defence was in my view not an afterthought. In the case of *Wachera v Republic* [2025] KEHC 11843 (KLR), this court posited as follows:
  43. The court was wrong in blaming the appellant on having the alibi at the tail end. However, the court was correct in finding that these questions were not put to the witnesses. This is important since the offence occurred at home.



44. The court found that the appellant and the minor lived in the same house. The appellant was the perpetrator. In this case, there are no doubts on who the perpetrator was. It was the Appellant. The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call. With reference to alibi evidence, the court of appeal in *Erick Otieno Meda vs. Republic* [2019] eKLR stated thus:
- “In considering an alibi, we observe that:
- a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
  - b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
  - c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
  - d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.
120. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused’s alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie – v- Republic* [1984] KLR, this Court stated: “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....”
46. In the South African case of *S -v- Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:i. There is no burden of proof on the accused to prove his alibi.ii.If there is a reasonable possibility that the accused’s alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.iii.An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."iv.If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").v.The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.
47. The burden of proving the falsity of an alibi was addressed in case of *Victor Mwendwa Mulinge –v- R*, [2014] eKLR as follows: -“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution....”
48. In another persuasive South African case of *R - v - Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:‘If there is evidence of an accused person’s presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.



121. The minor testified regarding the alleged incidents that occurred over three or four days, providing largely repetitive accounts of what had transpired. She did not state that she had been threatened, nor did she report the incidents to anyone. PW2 confirmed that she had been washing the appellant's garments and did not observe any bloodstains, particularly after 18.12.2023. The medical evidence did not reveal any injuries consistent with the use of sticks. PW2 testified that she found the complainant in a dirty state and applied some jelly; upon initially examining the anus, she did not observe any abnormalities in the vagina.
122. PW2 maintained that the minor had been suffering from a common cold and tonsillitis for some time and therefore took her to Afya Bora Clinic. DW3 confirmed that the minor was treated and given medication at the clinic, which was the first point of care. The court does not accept the suggestion that the clinic refused to treat the minor; the more plausible explanation is that no injury was found, and the clinic did not wish to be involved in a potentially unfounded claim. It is unclear why the prosecution did not call the clinic as a witness. In the circumstances, a negative inference must be drawn.
123. The minor thus lied about the use of sticks. She gave her reason that if she lied, the mother could beat her. She also admitted that the mother prepared her for testimony. Such evidence, however painful it may appear, is of no use. The minor did not, contrary to the court's postulations, meet the requirements of section 124 of the *Evidence Act*. Unfortunately, tampered evidence is not truthful evidence. The court cannot pick one part and leave the rest out. The P3 and PRC were filled at the same time, though they have different temperatures. Is there a possibility that they are not genuine? The court left this aspect to the examining medic who was not present.
124. In the case of Michael Muriithi Kinyua v Republic [2002] KECA 315 (KLR), the court of appeal [Chunga CJ, Tunoi & Lakha JJ A], the court addressed the issue of discredited evidence as follows:
- If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail.
125. Once the medical evidence showed there were no injuries, especially the alleged sticks, then PW1's evidence fell entirely. Further, PW2 purported to examine the minor's anus when she was suspecting a different injury. There was no medical evidence of injury to the anus, contrary to the evidence of PW2.
126. The medical evidence was by experts. In addressing expert evidence, the court must have regard to the entire gamut of evidence, not just expert evidence. 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.
127. 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.



128. 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; [19951998] 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.

129. Whereas they show penetration, which they conclude was penile, PW4 stated that there is nothing to connect the penetration to the appellant. He was, however, categorical that there were no external injuries. This rules out the appellant's story of using sticks. There is a reasonable doubt about why the minor could be lying. During *voire dire*, the minor stated as follows:

Court: did anyone tell you what to say in court

Minor: yes: mother

She told me to tell the truth

Court: did she tell you anything else

No

130. The minor admitted that the mother had told them what to say in court. There was no removal of the mother from court. The minor indicated that her mother beats her. Such evidence given under the threat of beating is not free from error. This is thus consistent with questions that arise from the PRC. The external genitalia is normal, with only reddish labia majora and minora. There was a whitish discharge, but no spermatozoa. this was said to be a fungal infection, which does not in any way show sexual activity.
131. The child was at least with DW3 and PW3 throughout, until the appellant and DW2 came at 8 pm. Thus, the story of being defiled on 7.1.2024 is false. The 6.1.2024 was also fully covered by witness evidence. There was no possibility of defilement while the minor was in the custody of W, DW3, and later PW 2.
132. Of concern was the extent of the minor's damage. The minor had a common cold and tonsillitis and was being cared for. The appellant was being sent for medicine, and the minor was with the grandmother or grandfather. There was also no reason why PW2 did not tell PW3 about the alleged defilement. Even the story of sending medicine is false, as all witnesses agreed that DW1 was the one sent to buy medicine.
133. The mere fact that the hymen was old and broken does not, in and of itself, show that there was defilement. Further, the injuries recorded are superficial and thus inconsistent with defilement by an



adult man several times. PW2 who was washing PW1's garment did not find any blood in any of the days.

134. I do not find that the Respondent proved their case beyond a reasonable doubt that the Appellant penetrated the vagina with his penis. The medical evidence did not support the version of evidence tendered by the prosecution. In *Philip Nzaka Watu vs. Republic* [2016] eKLR, the Court of Appeal held that:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

135. 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.”



136. The trial court failed to hold that such a magnitude of contradictions, unless satisfactorily explained, will usually, but not necessarily, lead to the rejection of a witness's evidence. 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.”

137. Therefore, in my overall reevaluation of the evidence, I am unable to agree with the trial court that the prosecution proved the offence beyond a reasonable doubt. There was indeed no evidence of penetration. It is unnecessary to go into who committed the offence in the absence of the offence.

138. In totality, the Respondent herein did not prove the offence of defilement against the Appellant beyond a reasonable doubt, and the trial court erred in convicting the Appellant.

139. Before proceeding to the next question, I wish that parties would not use personal vendettas to cause untold suffering and rifts within families. Whereas I do not wish that the good Lord reserves the hottest place in hell for the architect of this frame-up, I regret that Parliament had section 40 of the *Sexual Offences Act* repealed. The higher courts need to give more cogent directions on section 124 of the *Evidence Act*. Courts have used it as if it sets aside the burden of proof and the presumption of innocence.

140. There has always been an understanding that all three conditions of the proviso to section 124 have to be met. 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 madeup 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.

141. The court then has to deal with the issue of sentence. The nature of sentences under the Sexual Offences Act is circumscribed. This particular offence under section 8(1) and (2) of the *Sexual Offences Act* provides for a mandatory sentence of life years imprisonment. The question of such sentences was addressed in the case of *Republic v M; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [supra] 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.
142. 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:

Paragraphs 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.



143. However, having allowed an appeal on conviction, the issue of sentence is moot.

**Order**

144. In the circumstances, I make the following orders:

- a. The Appeal on conviction and sentence is allowed. The conviction and sentence are set aside. The appellant is set free unless otherwise lawfully held.
- b. The appellant's name be removed from the register of sexual offenders.
- c. Right of appeal 14 days.
- d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 21<sup>ST</sup> DAY OF JANUARY, 2026.  
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Ms. Kaniu for the State

Mr. Nderi Kiingati for the Appellant.

Court Assistant – Michael

