



REPUBLIC OF KENYA



**Masika v Republic (Criminal Appeal 176 of 2020)
[2026] KECA 174 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 174 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 176 OF 2020
DK MUSINGA, PO KIAGE & GV ODUNGA, JJA
JANUARY 30, 2026**

BETWEEN

HABBERT ETYERI MASIKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court at Busia (Kiarie Waweru Kiarie, J.) delivered on 8th April 2022 in Criminal Appeal No. 30 of 2019)

JUDGMENT

1. Before us is a second appeal lodged by the appellant, Habbert Etyeri Masika, against the judgment delivered on 8th April 2022 by the High Court at Busia (Kiarie Waweru Kiarie, J.) in High Court Criminal Appeal No 30 of 2019. The appeal emanated from the judgment of the Chief Magistrate's Court at Busia in Criminal Case (S.O) No. 4 of 2018 in which the appellant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 8th January 2018 in Teso North sub-County of Busia County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FMB, a child aged 4 years. The appellant denied the offence and a plea of not guilty was entered.
2. Briefly, the prosecution's case, as narrated by the complainant, PW1, in her unsworn evidence, was that on 8th January 2018, after returning home from school and removing her school uniform, she escorted her friend to their home where she stayed until nightfall when she decided to return home. On the way she came across the appellant, a stranger, wearing a muffin cap and a black jacket, who held her hand and offered to assist her get a boda boda home. Instead, the appellant took her to his house next to a bush where he removed her pant and "committed bad habit" to her by inserting his "susu" (penis) in her "susu"(vagina) and anus. While threatening to kill her if she screamed, the appellant urged her to



bear the pain. As a result of the painful ordeal, PW1 bled from her private parts. Leaving the pant in the appellant's house, the appellant took her to the bush, promising her to take to her food which he never did. PW1 spent the night in the bush, and the following morning, while walking away, she came across a lady who gave her porridge and mandazi before taking her to the hospital for treatment. PW1, though having not known the appellant prior to the date of the incident, was able to identify him in court. She also identified her pant that she was wearing at the time of the incident, the muffin cap that the appellant was wearing on his head, the jacket and the knife that the appellant had.

3. PW5, Judith Isegere, had on the morning of 9th January 2018 opened her shop when at 6.00 am. She was called by a lady running a hotel to the latter's hotel, where she found PW1 shivering, with blood on her body. She carried PW1 to her house and upon examining her, realised that she had no pant and had been defiled. PW1 informed her that she had been defiled by a man and led her to the area where the incident occurred. While still there, PW1's father, (PW4) arrived and together they proceeded to report the incident at the police station.
4. PW4 confirmed that PW1 was his daughter and was aged 5 years. At 5.00pm on 8th January 2018, PW1 returned from school with her friend, removed her school uniform and after taking tea, escorted her friend to their home. By 6.30pm, PW1 had not returned and the family decided to look for her. At the home of PW1's friend, they were informed that PW1 had left. Having failed to trace PW1, they reported the matter at Malaba Police Station and called it a night. The following morning, the search for PW1 resumed and at around 6.00am, he received information that a child had been found within the vicinity. Proceeding to the place, he confirmed that the child was PW1, who had wet clothes and was bleeding from her private parts. PW1 informed them of what had taken place and when they went to the house where they were taken by PW1, which was at the gate of a compound with other houses, they did not find the appellant. They then proceeded to Malaba Police Station after which they went to Kocholya Hospital where PW1 was treated. Later he was informed that the appellant had been arrested. PW1 told him that the man who defiled her was a bald-headed man who, at the time was wearing a muffin cap and a jacket. The man had promised to give her sweets and food. He was later informed of the recovery of PW1's pant from the appellant's house.
5. PW2, the mother of PW1, confirmed that PW1 was born on 16th December 2013 and was 5 years old. She relied on the certificate of birth which she identified. She reiterated PW4's evidence that PW1 left school together with her friend with whom she later left to play. When she did not turn up at home at 7pm, she went to look for her at the friend's home where she was informed that PW1 had left. After reporting the incident to the police the next day, she was informed that PW1 had been found by the roadside, defiled. Unable to stand the bad news, she fainted while PW4 proceeded to go and check the information. Later she was informed that PW1 was at the police station where she went to before they proceeded to Kocholya Hospital for treatment. It was her evidence that PW1 had blood all over her body as well as from her injured anus. Her vagina was "completely torn" and her anus "badly damaged". With the assistance of a counsellor, PW1 narrated what happened to her. She, however, did not know the appellant prior to the incident. When the news of the arrest of the appellant was received, she went to the house where the appellant was staying as a caretaker, which was not far from the home where PW1 was playing. The house was next to the gate and from that house recovery of PW1's pants was made together with a black jacket, a black muffin cap and a knife, all of which she identified in court. PW1 had informed her that she had left her pants in the appellant's house and that the bush where PW1 was left by the appellant was far from the appellant's house.
6. PW3 testified that he was the one who facilitated the appellant's employment as a caretaker in the compound where the appellant was staying, under his supervision. The appellant had been his working mate at the construction site. On 8th January 2018 at 8.00pm, the appellant called him and informed



- him that he had been arrested. He proceeded to the police station the following day and found the appellant who informed him that he had been arrested over an offence of defilement. He asked the appellant for the keys to his house and when he went to the house, he found a white dotted girl's pants hanging on a rope. He then reported the recovery to the police who went and took the pants.
7. PW6 confirmed that PW1 was treated at Kocholya Hospital where he examined her on 9th January 2018. According to him, her outer genitalia was normal but there was blood on the labia majora and labia minora. Her hymen was freshly broken and there was blood in her vagina as well as in her urine. He filled in the p3 form which he exhibited. PW7 and PW8 arrested the appellant from his place of work on 9th January 2018 at 7pm after being tipped off by members of the public about the appellant's presence. The incident was investigated by PW9 after the report of the missing child was made at the police station on 8th January 2018. On 9th January 2018 at 8.00am, a lady went to the station carrying a shivering child who had blood all over her body and was bleeding in her private parts. The girl had no pants. They took her to Kocholya Hospital where she was examined and put on medication. PW9 recorded statements from the person who was with the child and then they proceeded to the bush where the child had been abandoned but they did not recover anything there. After the arrest of the appellant, on 10th January 2018, they escorted the appellant to his house where a black muffin cap, jacket and pants were recovered, all of which were exhibited. The pants was on the cloth line under the appellant's clothes. Blood samples were taken from both PW1 and the appellant and were on 15th January 2018 taken to Kisumu Government Chemist for DNA analysis. He produced the black muffin, the black jacket, the pants, PW1's blood- stained skirt and blouse, the exhibit memo and report and PW1's certificate of birth as exhibits. It was her evidence that PW1 was 4 years old at the time. In cross-examination, PW6 however explained that the pants were recovered on 11th January 2019 (sic) by the caretaker after the recovery of the jacket, the knife and the muffin cap.
 8. When placed on his defence, the appellant gave unsworn evidence in which he stated that on 9th January 2018 he woke up and went to where he was working as the caretaker until about 6.00 pm when he left to look for food. At 8.00pm when he was preparing his supper, AP Officers came and informed him that he was required at Malaba police station where he was informed that he had defiled a child on 8th January 2018 at 6.00 pm. He denied running away from his place of abode. He denied that the clothes which were before the court belonged to him and denied that PW1's pants was recovered from his house. His case was that the charges were instigated after he had, on 28th November 2017, complained at Malaba police station about the complainant's (sic) worker who had ran away with his money. When he went to the station on 8th January 2019 (sic), he found the person against who he had complained together with the complainant's mother. He stated that he had been paid Kshs. 10,000 leaving a balance of Kshs. 32,000. In his evidence, the criminal case against him was a frame-up.
 9. In his judgment, the learned trial Magistrate found that all the ingredients of the offence of defilement were proved by the prosecution and convicted the appellant for defilement. He was sentenced to life imprisonment.
 10. On appeal to the High Court, the appellant, in his home- made grounds, contended that the learned trial magistrate: relied on hearsay and contradicting prosecution witnesses' testimonies; relied on primary evidence which did not contain any probative value to support the charge; ignored the gross anomalies in the production of the DNA evidence, which was produced by an incompetent witness; disregarded the defence; and ignored the gross violations, infringements and denials and threats to his constitutional rights to fair trial as enshrined in Article 50 of *the Constitution*. He prayed for his conviction to be quashed, sentence set aside and he be set at liberty and in the alternative, the court to order for retrial in view of the constitutional violations.



11. In his judgment, the learned Judge, in dismissing the appeal found: that the appellant was accorded a fair trial; that pursuant to section 77 of the *Evidence Act*, it was not mandatory for the maker of the documents to produce them in court, hence the report was procedurally and lawfully produced; that the DNA evidence and the finding of the victim's panty in the appellant's house were sufficient evidence to link the appellant to the offence; that the birth certificate established that PW1 was aged 5 years; and that the medical evidence established there was penetration of PW1's genitalia. It was found that the only prescribed sentence under section 8(2) of the *Sexual Offences Act* was imprisonment for life, thus the sentence meted out was lawful.
12. Aggrieved, appellant is before us on a second appeal contending that:
 1. The Lower courts erred in law by not appreciating that his right to be brought before court within 24 hours of his arrest was grossly violated by the prosecution contrary to Article 49(1)(f) of *the Constitution*.
 2. The medical report that was produced by PW9, a police officer was against section 77(b) of the *Evidence Act*.
 3. The lower courts failed to detect that the charge sheet was fatally defective hence incurable under section 214 and 384 of the Criminal Procedure Code
 4. The primary ingredient of the offence charged (identification) failed to suffice during trial and the prosecution failed to prove its case beyond reasonable doubt as required by law under section 109 of the *Evidence Act*.
 5. Section 213 and 310 of the Criminal Procedure Code were grossly violated as the appellant was not given a chance to either file submissions or make oral submissions.
 6. The circumstantial evidence relied on by both the courts presented by the prosecution was very weak since there was no eye witness of the offence charged save the unfounded allegation of complainant.
 7. The material witness evidence was not produced by the prosecution.
 8. There were material contradictions, inconsistencies and discrepancies of the Prosecution evidence.
13. The appellant prays that we set aside his conviction and quash the sentence or make such orders as we may deem fair and just.
14. When the appeal came up for virtual hearing, the appellant appeared in person from Kisumu Maximum Prison while learned Senior Prosecution Counsel, Ms. Mutellah, appeared for the respondent. Both the appellant and Ms Mutellah relied entirely on their filed written submissions.
15. In support of his appeal, the appellant submits that he was not arraigned in court within 24 hours from the date of his arrest as required under Article 49(1)(f) of *the Constitution* since the charge sheet shows he was arrested on 9th January 2018 but arraigned in court on 12th January 2018; the DNA report can only be produced by an expert pursuant to section 48 of the *Evidence Act*, thus the failure to call its maker was fatal to the prosecution's case as he was denied an opportunity to cross-examine the maker thereof; that the charge sheet did not comply with section 137 of the Criminal Procedure Code since the word "unlawfully", the age of the complainant and time of the offence were omitted; that these defects were not curable under section 382 of the Criminal Procedure Code; that since no one saw him commit the offence his conviction was based on suspicion but as was held in *Mary Wanjiku Gichira*



v Republic, Criminal Appeal No. 17 of 1998, suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence; that the description given by the complainant via dock identification was unsatisfactory and was contrary to the holding in *Gabriel Kamau Njoroge v Republic* (1982-1988) I KAR 1134 that dock identification should be preceded by an identification parade; that the search that was conducted in his house was contrary to the Police Act since no search warrant was obtained before it was done; that the prosecution evidence by PW1, PW2 and PW4 is impeachable under sections 214 and 384 of the Criminal Procedure Code for being untruthful; that the evidence of the complainant was contrary to the holding in *Ndungu Kimani v Republic* (1979) KLR and *Kiilu v Republic* (2005) KLR 174 with respect to believability of a doubtful witness; that the trial court made a ruling on a case to answer as well as the judgement without giving him a chance to submit, hence his right to fair trial was violated as was held in *Akhuya v Republic* (2003) eKLR; that the circumstantial evidence relied upon the trial court was weak since the testimony of PW2, PW3, PW7 and PW8 did not place the appellant at the scene and as the person responsible for committing the offence; that no spermatozoa was found on the complainant's vagina; that crucial witnesses like Ronald Kitumati Langat and Mrefu mentioned by PW7, mother to PW1 friend, Inspector Obuya who was with the crowd that wanted to attack the appellant, CPL Lelei instructed by Inspector Obuya to pick the appellant, 7 members of the public who accompanied PW7 and PW8 to the appellant's house, Hotel girl who saw PW1 shivering, Amos who was with Inspector Obuya when PW8 went to arrest the appellant, were not availed in court to buttress the prosecution case. The case of *Bukenya & Others v Uganda* (1972) EA 549 was cited in support of this line of submission; and that there were material contradictions, inconsistencies and discrepancies of the prosecution evidence, in particular PW1, PW2, PW4, PW5 and PW9. The appellant urged this Court to quash the conviction, set aside the sentence and set him free in the interest of justice.

16. The respondent, in opposing the appeal, submitted: that second appeals are, under section 361 of the Criminal Procedure Code, limited only to matters of law but the appellant has not only raised new issues that were never canvassed before the High Court sitting as a first appellate court, but has sought to have this Court re-evaluate factual issues which fall outside the scope of a second appeal; that contradictions, if any, were minor and did not vitiate the entire evidence; that the complainant's age was proved through the birth certificate which indicated that the minor was born on 16th December, 2012 and which established the complainant was aged five years old at the time of the offence; that penetration was proved through the complainant's testimony which was corroborated by the testimony of PW 6 on what the medical examination revealed; that the complainant indicated that the person who defiled her was wearing a muffin/cap and a jacket, which were recovered from the appellant's house as well as complainant's panty; that when subjected to DNA test the blood samples on the skirt she was wearing and the panty matched those of the appellant; that the absence of an eyewitness who witnessed him doing the act does not invalidate the case if the complainant's account is consistent and corroborated by medical or circumstantial evidence; that despite the appellant's contention that the case was a frame-up, none of the witnesses who testified, save for PW3, who had assigned the appellant caretaker duties, knew the appellant before the incident; that the conviction was based on direct evidence of the complainant, corroborated by the medical findings and circumstantial evidence consistent with the events, thus the fact that there was no identification parade conducted does not vitiate the conviction; that the appellant has not indicated or pointed out what contradictions and/or discrepancies, if any there were in the expert and medical report; that section 77 of the [Evidence Act](#) allows the court to admit into evidence a report by a government analyst, medical practitioner, ballistic expert, document examiner or geologist as evidence as long as the authenticity of the document is not disputed and the appellant never objected to the production of the said document, that the trial court considered the appellant's defence evaluated it and found it implausible or unsupported before reaching its final conclusion in the matter; that the issue of not being brought before the court within



24 hours contrary to Article 49(11)(f) of *the Constitution* was not an issue that was raised before the High Court on first appeal or before trial court for its consideration and determination; that the charge sheet as framed was proper since a reading of the particulars of the offence show that the narrative of the particulars carried the exact wording of section 8(1) of the *Sexual Offences Act* which does not require that the age of the minor must be given or that the word “unlawfully” be expressly stated since sexual intercourse with a minor can never be lawful; that the issue was, in any case, not raised by the appellant before the two courts below. We were urged to find that the appeal lacks merit and dismiss it in its entirety.

17. This being a second appeal, our jurisdiction is founded on section 361(1) of the Criminal Procedure Code which provides that:

A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

- a. on a matter of fact, and severity of sentence is a matter of fact; or
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

18. This provision was applied in *In Mwashanga Mwadingo v Republic* [2018] eKLR, the Court expressed as follows:

“We appreciate that this Court cannot interfere in the findings of fact by the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See *Bernard Mutua Matheka vs Republic* (Criminal Appeal No. 155 of 2009 unreported). We remind ourselves further, as expressed in a litany of our decisions that we must as much as possible defer to the concurrent findings of fact by the two courts below.”

19. This position was succinctly enunciated in *Kalameni v Republic* [2003] eKLR in which this Court stated:

“We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re-assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence.”

20. As this Court in the case of *Stephen M’Irungi & Another v Republic* [1982-88] 1 KAR 360 held, that we have:

“loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law.”



21. In this appeal we are therefore bound, as was held in the decision in *Adan Muraguri Mungara v R CA Cr App No 347 of 2007*:

“to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere.”

22. As we have stated above, the appellant’s appeal to the High Court was based on the contention that learned trial magistrate: relied on hearsay and contradicting prosecution witnesses’ testimonies; relied on primary evidence which did not contain any probative value to support the charge; ignored the gross anomalies in the production of the DNA evidence, which was produced by an incompetent witness; disregarded the defence; and ignored the gross violations, infringements and denials and threats to his constitutional rights to fair trial as enshrined in Article 50 of the Constitution.

23. It is clear that a number of grounds of appeal taken before us were never taken up before the High Court. Our understanding is that this Court can only entertain and determine allegations directed against the High Court arising from the grounds of appeal that were placed before it. Therefore, generally an appellant is not permitted to challenge the decision of or determinations by a magistrate’s court which have not been the subject of an appeal before the High Court. In other words, for a ground to be taken before this Court, that ground ought to have been taken before the court appealed from. A party is therefore, not be permitted to raise, for the first time in this Court, a point which was never raised before the first appellate court below and which that court had no opportunity of pronouncing itself upon. In *Alfayo Gombe Okello v. Republic [2010] eKLR* it was held that:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

24. The effect of raising an issue on appeal for the first time was discussed in, among other cases, *Kenya Commercial Bank Ltd v James Osede [1982] eKLR* where Hancox, JA. (as he then was) had this to say:

“... that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge.”

25. The Court went on to observe:

“It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal.”

26. Addressing himself to the prejudicial effect of new points of law or issues raised for the first time on appeal, Forbes, VP had this to say in *Alwi A Saggaf v Abed A Algeredi (1961) EA 767 CA 610*:

“...these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot



be satisfied that the facts, if fully investigated, would have supported the new plea. In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it.”

27. In the same vein, this Court in *Sudi Mnalo Mweke v Republic* [2023] KECA 1527 (KLR) associated itself with the holding by the predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767, where it laid down the guiding principle that the course of taking on appeal a point of law which has not been argued in the court below ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.
28. We share the Court’s view and the sound justification for that holding, namely that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.

It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court.”
29. For the foregoing reasons, and on the authority of the afore- cited judicial decisions, we respectfully decline to consider or pronounce ourselves on the new issues raised for the first time in the instant appeal.
30. In this appeal, the issue in contention, broadly, is whether the prosecution proved its case beyond reasonable doubt. We however will not deal with the defect in the charge sheet, the failure to give the appellant opportunity to submit and the appellant’s arraignment outside the 24 - hour period pursuant to Article 49(1)(f) of *the Constitution*. We note that the appeal before the High Court was based on the violations of Article 50 rights.
31. We shall, in determining whether the case was proved interrogate the questions: whether the ingredients of the offence were proved; whether there were inconsistencies in the evidence and whether they were dealt with; and whether the exhibits, particularly the medical report and the DNA report were properly produced.
32. This Court in *Shitula v Republic* [2025] KECA 12 (KLR) held that the main ingredients of the offence of defilement are, proof that the victim is a minor; that there was penetration of the victim’s genital organs with the genital organs of another person; and that the accused person was the person who penetrated the victim’s genital organs.



33. Proof of age in sexual offences is very crucial and as was appreciated by this Court in *Alfayo Gombe Okello v Republic* (2010) eKLR where it noted that:

“In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”

34. Similarly, this Court in *Reuben Dena Makomba v Republic* [2018] eKLR cited the case of *Kaingu Elias Kasomo v Republic*, Malindi Court of Appeal in criminal appeal No. 504 of 2010 in which it was emphasised that:

“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.”

35. In this case, PW1 stated that she was 6 years old while PW2 and PW3 stated PW1 was aged 5 years. PW2 stated PW1 was born on 16th December 2013. PW9 stated that PW1 was aged 4 years at the time of the incident and produced PW1’s certificate of birth as exhibit P12. We therefore find that PW1’s age was proved as below 11 years.

36. As to whether there was penetration, there are concurrent findings from the two courts below that the fact of penetration was proved. The only issue in contention is whether the medical report ought to have been produced by PW6. Section 77 of the *Evidence Act* provides:

1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

37. In *Erick Wambulwa Muchocho & Another v Republic Nakuru Criminal Appeal No. 24 of 2003 (UR)* this Court, (Omolo, Owuor & O’Kubasu, JJA.), held that:

“Ground eight of the grounds of appeal deals with the production of the report of the ballistic examiner by one of the police officers. That report was obviously produced under the provisions of section 77(1)(3) of the *Evidence Act*. The prosecution was entitled to do so and the learned trial magistrate did not think it fit to summon the ballistic examiner under section 77(3). None of the appellants asked that the examiner be called and while we appreciate Mr Kagucia’s contention that magistrates ought to point out to the accused persons that they can demand the calling of the examiner the law as it stands now does not demand that magistrates must bring this to the attention of the accused person....We hope that magistrates, if they themselves do not see the need to call such a witness, will at least draw



the attention of the accused persons, particularly where they are not legally represented, to this provision. But it would be simply wrong for this Court to elevate our suggestion to the magistrates to the level of a mandatory requirement of the law.”

38. While we reiterate the desirability of the trial courts bringing to the attention of the accused the provisions of section 77 of the *Evidence Act* and inquiring from them whether they seek to have the documents produced by the maker, particularly where they are unrepresented, the failure to do so is not necessarily fatal in cases, more so where there is sufficient evidence over and above the document in question supporting the fact in question. In this case, we find that the fact of penetration was proved by evidence of independent medical report. We associate ourselves with the opinion of the Supreme Court of Uganda in *Bassita Hussein v Uganda*, SC Criminal Appeal No. 35 of 1995, cited in *Cheruiyot v Republic* [2025] KECA 1780 (KLR)

that:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim’s evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.”

39. On whether it was the appellant who defiled PW1, there was the evidence of PW1 who identified the appellant as the perpetrator. Apart from her evidence, which was direct evidence, there was the circumstantial evidence of the recovery of PW1’s panty in his house. The appellant however took issue with the fact that the author of the DNA report was not called to testify. Apart from the fact that no objection was raised by the appellant, the decision in *Erick Wambulwa Muchocho & Another v Republic* (supra) applies with equal force to that submission. The conclusion in that report was that:

“...the DNA profiles generated by the blood stains from the spotted skirt (item 2 “A”) and the white spotted waist inner wear (item “A”3) was mixed DNA profiles of (name withheld) (survivor) and Habert Atieri Matika (accused) whereas the DNA profile generated by the stains from the spotted checked blouse (item “A1”) matches the DNA profile (name withheld) (survivor).”

40. In our view, there was sufficient evidence on record on the basis of which the conviction of the appellant could be and was properly founded.

41. As regards the inconsistencies, it is now trite that where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. See *John Nyaga Njuki & Others v Republic Nakuru* Criminal Appeal No. 160 of 2000 [2002] eKLR. 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. See *Philip Nzaka Watu v Republic* [2016] eKLR. In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of section 382 of the Criminal Procedure Code, and whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. In our view the discrepancies in the evidence of the witnesses in question as to time were not material to the conviction of the appellant and did not go to the root of the case against him.



42. The appellant also raised the issue of failure to call some witnesses such as Ronald Kitumati Langat (DNA report), Mrefu mentioned by PW7, Mama Ashley, mother to PW1 friend, Inspector Obuya who was with the crowd that wanted to attack the appellant, CPL Lelei instructed by Inspector Obuya to pick the appellant, 7 members of the public who accompanied PW7 and PW8 to the appellant’s house, Hotel girl who saw PW1 shivering and Amos who was with Inspector Obuya when PW8 went to arrest the appellant. The answer to this submission is to be found in Keter v Republic [2007] 1 EA 135, that:

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

43. We are satisfied that from the evidence adduced, it was sufficient for the prosecution to establish its case and hence there was no need to call all the witnesses mentioned.

44. Lastly, the appellant contended that his defence was never considered. It is clear that the appellant did not say anything about the events of 8th January 2018. His evidence was only about the events of the following day. This Court in Isaac Njogu Gichiri v Republic [2010] eKLR dealt with similar circumstances and pronounced itself as hereunder:

“With regard to failure by the superior court to give due consideration to the appellant’s defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: “I find that the defence of the 5th accused is not true.” We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: “The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.” We agree with this confirmation.”

45. We need not say anything more. In conclusion, we find no merit in this appeal which we hereby dismiss.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

