Rugumi v Republic (Criminal Appeal 103 of 2020)
[2026] KECA 197 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 197 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 103 OF 2020

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

JANUARY 30, 2026

BETWEEN

JOEL NJOROGE RUGUMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma (H.A Omondi, J.) delivered on 28th November 2013)

JUDGMENT

1. Before us is a second appeal lodged by the appellant, Joel Njoroge Rugumi, against the judgment delivered on 28th November 2013 by the High Court at Bungoma (H. A. Omondi, J. (as she then was)) in High Court Criminal Appeal No 227 of 2013. The appeal emanated from the judgment of the Resident Magistrates' Court at Webuye in Criminal Case No. 494 of 2011 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 charge were that on 26th March 2011 at [Particulars Withheld], Webuye Township in Bungoma East District within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DN, a child aged 8 years.

2. The prosecution called five witnesses in support of its case. DN, the complainant, who testified as PW1, narrated that on 26th March 2011 at around 2.00 pm, she left home to go and watch motor vehicles in town. When she got near the railway, the appellant, who was behind her, told her to follow him, threatening to beat her up if she ran away. Scared, she followed the appellant to a house with markings A, B, C and D on the wall, which they entered. The appellant locked the door, told her to remove her pants, took her to the bed, tied her legs and hands apart and inserted his penis into her vagina while covering her mouth. When the appellant was done, he untied her. During the night, the appellant

defiled her twice. She was left in the house and on the way home she met Mama Titus and her aunt, J, but she did not reveal to them where she was coming from, despite being asked. Upon reaching home, she lied to PW2, her guardian, that she was from Mzalendo, the posho mill man, but when PW2 realised that she had not been there and upon being beaten, she revealed that she had been in the appellant's house. She then took her mother and her brother to show them the appellant's house, after which they passed by and went to Webuye District Hospital where she was treated. From there, they proceeded to Webuye Police Station. It was her evidence that she saw a power saw in the appellant's house and that prior to the date of the incident, she had not seen the appellant. She identified the appellant at the police station. It was her evidence that she left her pants at the accused's house.

3. PW2, MNM, who was PW1's guardian, testified that PW1 was an 8 -year old orphan who was under her care. On 26th March 2011, she left PW1, other children and her sister in law, J, at home while she proceeded for a funeral in Tongaren. Upon her return from the funeral at around 8.00 pm, she found PW1 missing.

   The following day she sent her daughter, A, to look for PW1 at the home of PW1's brother, I (PW3), but PW1 was not there. At 12.00 pm, PW1 returned home, claiming that she was from the home of Mzee Mzalendo. This information turned out to be untrue, and it was then that PW1 disclosed that she had been waylaid by the appellant and defiled and that she had left her pants in his house. On examining PW1's outer vagina, PW2 saw a thick substance. PW1 took PW2 and PW3 to see the house, although they did not enter it. They proceeded to Webuye District hospital, where PW1 was treated and then went to the police station, where she recorded her statement. Later, PW3 took the police officers to the appellant's house.

4. PW3, IK, PW1's brother, confirmed that on 27th March 2011, while at home, A came to ask whether PW1 had spent the night in his house. He looked for PW1 at his aunt's house and classmates in vain. He was later informed that PW1 returned at 12.00 pm and that PW1 had spent the night at a certain man's house, where she was defiled. PW1 took them to the house where she had spent the night, after which they took her to the hospital for treatment. After making a report to the police, the police officers asked him to show them the appellant's house, which he did, being house number D in Chocolate Estate. Later, after the appellant was arrested, he was asked avail PW1 to identify the person who defiled her. PW1 was able to identify the appellant in an identification parade comprising of five people. It was his evidence that he had not seen the appellant prior to his arrest.

5. No. 73085 Cpl Rosemary Kurgat, PW4, to whom the report of the defilement was made on 29th March 2011 at 2. 00 pm by PW1 and PW2, took down the statements.

   According to her, the appellant cheated PW1 that he was taking her to town but ended with her in his house number D in Chocolate Estate. By the time the report was made, PW1 had been treated and age assessment done, which confirmed that she was 8 years old. She issued PW1 with a P3 form. PW1 and PW3 led them to the appellant's house, which they found locked. Upon inquiry from the owner of the house, they were told that the occupant of the house was Joel Njoroge, a power saw repairer in town.

   They were directed on how to find the appellant and with the help of PW1, they were able to find the appellant, who took them to his house, which was where PW1 had taken them and in which they found in the same state as had been described by PW1. Although PW1 told her that she left her pant in the appellant's house of the suspect, they did not find it. PW4 took the suspect to the police station and later for medical examination. During the appellant's arrest by her colleagues, PW4 stated that she stood with PW1 at a distance.

6. Edwin Lubale PW5, was the Clinical Officer who examined PW1 on 28th March 2011. According to him, PW1 was accompanied by PW2 when he was given the history of defilement of PW1 on 26th

March 2011 by a person she could identify. At the time of the examination, PW1 was weak and looked sick. The vaginal examination revealed no bleeding, but the labia folds were swollen, the hymen was perforated, and tender on digital examination. No spermatozoa or sperm cell were seen and the HIV test was negative and she had no STI. He stated that he was well conversant with the handwriting of Dr. Obiero who did the age assessment for PW1 and formed the opinion that PW1 was 8 years old, and whose report he produced.

7. When placed on his defence, the appellant, in his unsworn evidence, stated that he was a power saw repairer and that on 26th March 2011 at 6.00 am, he woke to go to work, where he arrived at 6.30 am. He left work at 5.00 pm and went home to bathe, before returning to work. He left his colleague at work and went to Eldoret, where he arrived at 8. 00 pm. The following day, a customer called him to repair his power saw, so he travelled to Webuye, where he arrived at 7.30 pm. On 2nd April 2011, police officers came to where he was working and arrested him. At the police station, he was told that he had defiled a child on 26th March 2011 and 27th March 2011. He claimed that the charges against him were framed.

8. Dismas Onyango, DW2, stated that he knew the appellant spends weekends at Eldoret with his family and comes back on Mondays. Apart from that, he did not know anything about the incident of 26th March 2011. Andrew Misiko, DW3, also stated that every Saturday the appellant would go to Eldoret to see his wife. He stated that on Saturday, after work, the appellant went to his house to bathe then left for Eldoret in the evening at around 5.00 pm and that he saw him back on Monday. He however did not go to the appellant's house on Saturday. Veronicah Mary, DW4, the appellant's wife, stated that on 26th March 2011, the appellant came to Eldoret at 8.00 pm. The appellant told her that he would be going to Webuye in the evening the following day since a client had told him to repair a power saw. At 5.00 pm, the appellant left for Webuye and when DW4 called the appellant at 8.00 pm, he confirmed to her that he had reached Webuye. She insisted that the appellant goes to Eldoret every weekend.

9. In her judgment, the learned trial magistrate found that the age assessment done by Dr. Obiero established that the complainant was about 8 years old as at 30th March 2011, thus the age of the complainant was proved beyond any reasonable doubt. On penetration, the learned trial magistrate held that it had been proved since the medical evidence established that her labia folds were swollen and the hymen was also perforated and tender. On identification, the learned trial magistrate observed that the description of the items found in the appellant's house fitted the description given by the complainant, and that PW1's initial lie that she had spent the night in Mzalendo's home was not fatal to the prosecution case. According to the learned magistrate, considering that PW1 was only 8 years, it was possible that what had happened to her was embarrassing and she could not have easily come out to explain. According to the learned trial magistrate, PW1 saw a power saw in the house, and it was not in dispute that the appellant was a power saw repairer. Regarding the appellant's defence, it was found to be a mere denial since DW2 and DW3 were not with the appellant in the house on 26th March 2011, while DW4 may have just defended the appellant to protect their relationship. The appellant was found guilty of defilement, convicted and sentenced to life imprisonment.

10. The appellant's appeal to the High Court was based on the grounds that the learned trial magistrate erred: by convicting the appellant on contradictory evidence of PW1, which was not corroborated; convicting the appellant when the identification of the appellant was not tightly proved; disregarding the appellant's defence as well as the evidence of his witnesses on his alibi; and handing him a harsh sentence without considering his mitigation.

11. In the judgment dismissing the appeal, the learned Judge held: that it was significant that PW1 led people to the same house on two separate occasions, to confirm that as the scene of the incident, thus the issue of mistaken identity of the house did not arise; that the fact that PW1 was not bleeding

and could walk was not evidence that there was no penetration; that PW1 had ample time to see the appellant because the encounter was in broad daylight and they walked together until they got inside the house; that the learned trial magistrate properly considered the defence case and rejected it on rational grounds; and that since the age of the complainant was within the legal limits, the sentence was proper.

12. Dissatisfied with that judgement, the appellant contends before us that:

    1. The Learned Trial Magistrate and the Learned Judge erred by not realizing that the Prosecution case was not proved beyond a reasonable doubt.

    2. The Learned Trial Magistrate and the Learned Judge erred by not realizing that a perforated hymen is not proof for the defilement, as a hymen can be perforated by other things other than sex.

    3. The Learned Trial Magistrate and the Learned Judge failed to give due consideration to the defence; the appellant's defence was rejected without cogent reasons.

    4. The Learned Trial Magistrate and the Learned Judge erred by not realizing that the circumstances of identification were not favourable and watertight to justify a conviction.

    5. The Learned Trial Magistrate and the Learned Judge erred by failing to realize that PW1 was an incredible person.

    6. The Learned Trial Magistrate and the Learned Judge erred by ignoring the truth that the Prosecution failed to call a vital witness in court to testify, i.e, Mzalendo, the Posho Mill man.

    7. The Learned Trial Magistrate and the Learned Judge erred by not realizing that Prosecution evidence was full of contradictions, inconsistencies, discrepancies, glaring gaps, and incredible.

    8. The identification, recognition, and arrest of the Appellant were improper.

    9. The Prosecution's case was not proved beyond a reasonable doubt.

    10. The Learned Trial Magistrate and the Learned Judge erred by not realizing that the alibi defence was truthful and coherent.

    11. The Appellant's right as enshrined in Article 25 and 50(2) of *the Constitution* was violated and infringed as he was not accorded a fair trial.

    12. The burden of proof was shifted to the Appellant

    13. The important documents, such as the Post Care Form and the birth certificate, were not produced in court as evidence or exhibits.

    14. The investigation in the instant case was shoddy and conducted in a shoddy way.

13. When the appeal came up for virtual hearing on 2nd September 2025, the appellant appeared in person from Kibos Prison, while learned prosecution counsel, Ms. Mwaniki, appeared for the respondent. Both the appellant and Ms Mwaniki relied entirely on their filed written submissions.

14. In support of his appeal, the appellant submitted: that defilement was not proved since in his evidence, PW5 stated that he did not see blood or sperm cells or injury, while PW2, who saw the vagina, stated it was not torn but only had a thick substance on the outer part; that PW2's evidence contradicted PW5's findings; that medical science has proved that the hymen can be broken by factors other than sexual intercourse; that the age of the hymen perforation was not established by PW5; that in rejecting

the alibi defence, DW4's right as a witness was, pursuant to section 127(2) (ii) (3) of the *Evidence Act*, violated, which was prejudicial to the appellant's defence; that the appellant was exposed to PW1 at the time of arrest, which rendered the identification parade worthless; that, due to forced and coached efforts, PW1 was persuaded and influenced by PW2 to change her mind from what she clearly stated on her whereabouts on the night of the incident; that PW1 was not a credible witness since she admitted telling a lie to Mama Titus.

15. In urging the Court not to rely on the inconsistent and contradictory evidence, the appellant cited the case of Dinkekai Khan Krishan Dandiya v Republic (1957) EA 336 and Bukenya & Others v Uganda (1972) EA 549 in support of the submission that vital witnesses such as Mzalendo were not called. He also cited Kariuki Karanja vs Republic (1986) KLR 190 and Abanga alia Onyango vs Republic, Cr. Appeal No.32 of 1990 in submitting that since PW1's pants were not found in his house, the test to be applied in finding a conviction based on circumstantial evidence was not met. It was further submitted that PW1's evidence was based on the identification evidence of a single witness, and thus, great caution ought to have been exercised before it could have been made the basis of the conviction. According to the appellant, the trial court did not comply with section 200(3) of the Criminal Procedure Code as the appellant was not accorded an opportunity to elect to have the matter start de novo. Regarding his defence, the appellant submitted that DW2, DW3, and DW4 corroborated his evidence that he was at his place of work and not at his house. According to him, the burden of proof was shifted to him to prove the case. He contended that the failure to produce the Post Rape Care Form in court rendered the case doubtful, as well as the failure to call Dr. Obiero, who is said to have assessed PW1's age. In his submission, there was no evidence that he defiled PW1, hence his appeal should be allowed in its entirety. We were further urged, in determining the sentence, to should consider the fact that he undertook studies in Diploma and Certificates while in prison at the rehabilitation centre.

16. In response, the respondent submitted: that PW1's age was proved by PW2, while PW5 confirmed, through an assessment report which was produced, that PW1 was 8 years old; that on the authority of the cases of Francis Omuron v Uganda Cr. Appeal No. 2 of 2000 and Richard Wahome Chege v Republic Cr. Appeal No. 61 of 2014, apart from the medical evidence, the age of the victim can be proved through the birth certificate, the victim's parent or guardian, and by observation and common sense; that PW5's evidence taken together with the P3 form (sic) established that there was penile penetration, based on the position in Mark Oiruri Mose v Republic (2013) eKLR, that as long as there is penetration, whether only on the surface, the ingredient of the offence is demonstrated; that PW1 was able to identify the appellant and even led PW4 to the appellant's house, which evidence was corroborated by that of PW2, PW3 and PW5; that the appellant was presented in court within 24 hours, and the trial was concluded without any unreasonable delay, thus no constitutional rights were violated; that pursuant to section 143 of the *Evidence Act*, no particular number of witnesses is required for proof of any fact and that the case of Julius Kalewa Mutunga v Republic Cr. Appeal No. 31 of 2005 is authority for the position that whether a witness should be called by the prosecution is a matter within their discretion, and no court will interfere with its exercise unless it is shown that the prosecution was influenced by some oblique motive; and that PW1's evidence was corroborated by PW2, PW3, PW4 and PW5 and reference was made to section 124 of the *Evidence Act* and JWA v Republic (2014) eKLR on reliance on the evidence of a child of tender years once the court is satisfied as to the truthfulness of the evidence.

17. Regarding the sentence meted out, the respondent submitted that the trial court took into consideration all the facts of the case as well as the mitigation from the appellant and that the sentence was very reasonable, being the minimum mandatory sentence provided under section 8(2) of the *Sexual Offences Act*. The respondent urged us to find no merit in the appeal and dismiss it.

18. We have considered the grounds of appeal and the evidence on record, the respective submissions filed by the appellant and respondent. Our duty as a second appellate court is to consider only issues of law as opposed to the facts which have been considered by the two courts below. See section 361(1) (a) of the Criminal Procedure Code and Daniel Kyalo Muema v Republic [2009] eKLR.

19. In our view, the appellant's appeal revolves around three issues: whether the case against him was proved beyond reasonable doubt; whether his alibi defence was given due consideration; and whether the sentence imposed upon him was deserved. There were other submissions made by the appellant which, in our view, were misplaced at this stage since they were not raised before the first appellate court. We cannot address our mind to matters which the first appellate court was not called upon to deal with and on that basis find fault with the decision.

20. On whether the case against the appellant was proved beyond reasonable doubt, the ingredients of the offence of defilement, as held by this Court in Shitula v Republic [2025] KECA 12 (KLR), 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 one who penetrated the victim's genital organs.

21. The centrality of the age of the victim in sexual offences was appreciated by this Court in Alfayo Gombe Okello v Republic (2010) eKLR where it was noted that it is the age of the victim that determines the sentence to be imposed. See also Kaingu Elias Kasomo v Republic, Malindi the Court of Appeal Criminal Appeal No. 504 of 2010 cited in Reuben Dena Makomba v Republic [2018] eKLR. In this case, PW1 stated she was 8 years old. PW2 and PW3 corroborated that evidence. PW5 produced her age assessment report by Dr. Obiero, which conformed that PW1 was 8 years old. No objection was raised regarding the production of that document. As this Court stated in Richard Wahome Chege v Republic [2014] KECA 453 (KLR):

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave
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> birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

22. Based on the evidence on record we are satisfied that PW1's age of 8 years was proved beyond reasonable doubt.

23. Regarding penetration, PW1 sufficiently narrated how the she was defiled and the number of times this was done. PW2 told the court that she saw a thick substance on the outer part of PW1's vagina. PW5 stated that PW1's labia folds were swollen and her hymen was perforated. The learned trial magistrate, based on the demeanour of PW1, believed her evidence that she was defiled. As this Court held in Nelson Julius Karanja Irungu v Republic [2010] eKLR:

> " ...when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."

24. This Court in Republic v Francis Otieno Oyier [1985] KECA 55 (KLR) pronouncing, itself in matters of credibility of witnesses, stated:

> "As to the count on assault causing actual bodily harm, the complainant's evidence of being beaten and punched by the respondent and the injury to her back testified to by the doctor who examined her were not seriously challenged and the trial magistrate believed that evidence. It was a finding based on credibility of the witnesses and unless no reasonable tribunal could make such finding, the first appellate Court had to respect it. It was not shown that the magistrate erred in his findings, or that he acted on wrong principles. The respondent was properly convicted and consequently the learned judge erred in law in allowing the first appeal."

25. We find no error in the finding by the learned trial magistrate, as confirmed by the High Court, that there was penetration of PW1's genital organs.

26. Was it the appellant that defiled PW1? According to PW1, she never knew the appellant prior to the date of the incident. When, in the morning, she met Mama Titus and her aunt, J, despite being asked where she was coming from, she declined to disclose to them what had happened to her. She also lied to PW2 by saying that she was at Mzalendo's home. Whereas there was evidence that she picked the appellant from an identification parade, the police officer who conducted the parade was never called to testify. In fact, PW4, the investigating officer did not mention the identification parade at all. Although in her evidence, in chief, PW5 insisted that PW1 took her to the appellant's house, in cross-examination she stated:

> " The house I was taken was a neighbouring house."

27. This answer by PW1 does not seem to have been considered by both the trial court and the first appellate court. In our view, without clarification, the possibility and PW3 could have taken the police to a different house, cannot be ruled out. We are not in a position to determine what the two courts would have concluded had they considered this issue. All that we can say, at this stage, is that the above response coupled with the fact that PW1 did not know the appellant prior to the incident and PW1's initial conduct of lying about her whereabouts the previous night, creates some doubt on the prosecution case and renders the appellant's conviction unsafe.

28. Apart from that, the appellant raised an alibi defence.

According to him, in the evening of the day in question, he travelled to Eldoret, as was usual, to be with his family.

According to DW2 and DW3, the appellant mentioned to them that he was travelling, although they could not confirm whether he did travel. DW4, his wife, however confirmed that he travelled to Eldoret and was with her until the following day in the evening. In his judgement, the learned trial magistrate dealt with the appellant's defence as follows:

> "I consider the accused's defence as mere denial. The defence witness Dismas Onyango (DW2) and Andrew Misiko (DW3) were not with the accused in his house on 26. 3.11. Veronica Mary (DW4) is the accused's wife and may just defended (sic) him to protect their relationship."

29. While we agree with the learned trial magistrate that the evidence of DW2 and DW3 did not substantially support the appellant's alibi defence in so far as they could not ascertain where the

appellant was that night, DW4 clearly supported the appellant's alibi defence. The appellant's defence, to the extent that it was alibi defence was not a mere denial as the learned trial magistrate put it. An alibi defence is a full defence and, as was held in the case of Patrick Muriuki Kinyua & another v Republic [2015] KECA 1000 (KLR):

> " an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged"

30. The position, where an alibi defence is raised was explained in Wang'ombe v the Republic [1980] KLR 14 where it was held that:

> " ...in Ssentale vs. Uganda [1968] EA 365, 368 [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion..."

31. We also fault the learned trial magistrate for dismissing the evidence of DW4 on the basis that "the accused's wife and may just defended (sic) him to protect their relationship". As this Court noted in Keter v Republic [2007] 1EA135:

> " There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."

32. Our findings above do not necessarily mean that the appellant's appeal before us must succeed. Before arriving at our determination, we must interrogate whether the appellant's alibi defence was sufficiently dealt with by the 1st appellate court which was enjoined to re-evaluate the evidence, analyse it and arrive at its own decision. See Okeno v Republic [1972] EA 32.

33. The learned Judge, on first appeal dealt with the alibi defence in one sentence as follows:

> " The trial magistrate in my view properly considered the defence case and rejected it on rational grounds."

34. Whereas we agree that the evidence of DW2 and DW3 in so far as they did not place the appellant somewhere other than where the offence was committed, the learned trial magistrate, apart from harboring doubts as to the credibility of DW4's evidence arising from her relationship with the appellant, did not go further to explain why he disbelieved DW4's evidence. In our view, apart from the issue of relationship between the appellant and DW4, the learned trial magistrate ought to have gone further to explain why DW4's evidence was discredited. A person who states that he was with his family at the time a crime was committed does not lose his defence merely because his witnesses are only his family members. The evidence, albeit being presented by family members must be tested as against the prosecution evidence with a view to determining the weight to be placed upon it. Such evidence ought not to be dismissed merely because it is "family evidence". In the case of Victor Mwendwa Mulinge v R [2014] eKLR this Court rendered itself thus on the issue of alibi:

> " 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 "

35. The falsity of an alibi defence, in our view, is not proved by merely finding that it was supported by a relative. The learned Judge merely stated that the defence case was rejected on rational grounds without specifying what the rational grounds were. If the rational grounds, according to the learned Judge, was the fact that DW4 was the appellant's wife, then we must differ from that finding as being contrary to law. Where the evidence is not properly analysed by the trial court, the first appellate court must deal with that evidence and where the two courts fail to deal with it, the decision cannot stand. This Court, faced with similar circumstances in Lukas Okinyi Soki v Republic [2004] KLR stated that:

> "The appellant, as we have stated raised mainly two defences. The first was one of alibi and the second was that there were grudges between the appellant's father and the complainant. Our understanding of the appellant's defence is that he could not be properly identified as he was not at the scene of the robbery and the complainant's evidence together with that of his wife and his grandson were all fabricated stories against him. On the other hand, the complainant and his wife were certain in their evidence that the appellant was one of the attackers. These were conflicting versions and demanded that the trial court had to carefully consider, analyse and evaluate the evidence that was before him both by the prosecution's witnesses and the appellant. He had to consider whether the circumstances for identification were favourable or not. He had to consider whether the defence of alibi was well founded and whether it was properly displaced by the prosecution case. The consideration had to clearly be borne by the record. Equally the first appellate court, as was stated in the case of Gabriel Kamau Njoroge vs. Republic (supra) had a duty to carefully analyse and weigh conflicting evidence and draw its own conclusion on the same, bearing in mind that it had not seen or heard the witnesses. We have perused the entire record of appeal and particularly the proceedings. We cannot see any evidence adduced either by the prosecution or by the appellant that would justify the conclusion the learned Magistrate came to, namely that the appellant's alibi was an open lie and an indication of guilt. He may not have been truthful when he said that PW4 summoned him and asked him if he knew about the robbery at the complainant's home but the burden was on the prosecution to displace his alibi. The prosecution did not lead any evidence from which one could conclude that the two receipts produced by the appellant were false. The learned magistrate rejected them on the basis that the appellant might have told a lie on a different point. The High Court did not make any findings of its own on the alibi defence. We do not know if the High Court would have come to the same conclusion as the magistrate on that point. On a second appeal, we must resolve that doubt in favour of the appellant with the result that the appellant's defence of alibi was wrongly rejected by the trial court and the first appellate court merely endorsed that rejection. That entitles us to interfere with the findings of the two courts."

36. Similarly, in this case, the alibi defence raised by the appellant was not given its due consideration by the trial court. The first appellate court failed in its duty to subject the evidence to scrutiny in order to confirm the findings by the trial court. In these circumstances, being the second appellate court, we cannot purport to re-analyse and re- evaluate the evidence before the trial court and make findings of fact on the appellant's alibi defence.

37. In the premises, this appeal succeeds. We set aside the appellant's conviction, quash the sentence and set him at liberty unless he is otherwise lawfully held.

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