



**Mukuria alias Kugwa v Republic (Criminal Appeal E037 of 2025)
[2026] KEHC 1355 (KLR) (11 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E037 OF 2025
DKN MAGARE, J
FEBRUARY 11, 2026**

BETWEEN

WILSON KARANJA MUKURIA ALIAS KUGWA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. D.N. Bosibori, resident magistrate in Múkúrwe'iní PMCSO No. E020 of 2020. The appellant was convicted on 20.1.2022. He was subsequently sentenced to 20 years' imprisonment on 25.1.2021. The appellant sought and was granted leave to appeal to this court vide Nyeri HC Misc. Application No. E049 of 2025. The appellant appealed to this court and set forth the following amended grounds of appeal:
 - i. The learned trial magistrate erred in imposing the mandatory sentence of 20 years without taking into account that Section 200 of the Criminal Procedure Code was not complied with which rendered the proceedings irregular and the sentence unlawful.
 - ii. The learned trial magistrate erred in law and fact in sentencing the Appellant to 20 years without voire dire to ascertain whether she understood the nature of oath.
 - iii. The learned trial magistrate erred in law and fact in convicting the Appellant without proof of essential elements.
 - iv. The learned trial magistrate erred in law and fact in failing to give consideration to the nature of defense and evidence of the defence.
2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 3.9.2020 at Nguyoini village within



Múkûrwe'inî subcounty of Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JMN, a child aged 12 years.

3. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on 3.9.2020 at 1700 hours at Nguyoinî village within Múkûrwe'inî subcounty of Nyeri County, the Appellant intentionally touched the vagina of JMN, a child aged 12 years with his penis.
4. The Appellant was arraigned on 16.09.2020 before E.N. Angima, Resident Magistrate, and he denied the charges. A plea of not guilty was consequently recorded. The appellant was granted bond of Ksh. 100,000/= and released on 17.11.2020.
5. The first trial court took evidence of all prosecution witnesses while the convicting court took evidence of the Defence case. It is unclear from the record how the two magistrates transitioned from one court to another.

Evidence

6. The prosecution evidence was recorded by E. N. Angima, Resident Magistrate, until she placed the appellant on his defence. She then disappeared from the record. Next, we find Hon. D.N. Bosibori, Resident Magistrate, taking defence evidence. The court will shortly address the lacuna in the procedure and the effect on the trial.
7. PW1 was James Nderitu Njaramba, the Clinical Officer from Múkûrwe'inî Hospital. According to him, on examination, the minor was 12 years. He examined the minor on 16.9.2020 and noted that the external genitalia was normal. Hymen was broken. No fresh blood noted. There were lacerations and tenderness on the bilateral majora, which were inflamed. There were numerous white blood cells, and pus cells were seen. The witness produced the P3 Form dated 16.9.2020 and the PRC Form dated 15.9.2020. On cross-examination, he confirmed that the date on the PRC form had been overwritten.
8. At trial, PW2, the minor, testified that she was born on 22.6.2020 and was 12 years old and that the Appellant was a close neighbor. She stated that on 3.9.2020, she went to get vegetables, potatoes, and onions. After she had bought, she passed by Uncle Kimathi's land to get some nappier for the cows. She saw the Appellant at around 5 pm, following her from behind. He removed his trousers to his knees and his underpants. He called her, held her waist, and pulled her towards himself. She was wearing a dress and a blouse. He removed her biker and innerwear to her knees. He then inserted his penis into her private parts. They were both standing. He raised her up. She felt pain and pulled herself away. His penis came out. She did not bleed, and she did not scream either. He gave her Ksh. 100/=. She recalled that it was on a Thursday. She told her mother on Sunday, 6.9.2020, because her mother was not home when the incident occurred.
9. They then went to Gumba Dispensary. They had informed the chief who accompanied them to the dispensary. The chief gave her mum PC Mwikali's mobile number. They went to Kangurue Police Post and were referred to Múkûrwe'inî Hospital.
10. On cross-examination, she testified that she found the Appellant after leaving his shop. The nappier grass was on one side of the road. The Appellant gave her Ksh. 100/=. Her mother asked where she had gotten the money, and she said the Appellant had given her. The next day, the mother asked whether the Appellant did anything to her, and she said no. However, the next day she decided to tell her mother the truth, and after that they went to Gumba Dispensary.
11. PW3 was Jane Gichuki Ndwiga, the minor's mother. She testified that the minor was born on 22.6.2008, the complainant was in Class 5 at RPS. On 7.9.2020, RWD, her other daughter, enquired



- whether the witness knew that the minor had Ksh. 100/= on 3.9.2020. She asked the minor where the money came from. The minor told her that Kugwa, the Appellant, gave her the money.
12. On 9.9.2020, the minor told her that the Appellant removed her innerwear and raped her on 3.9.2020. The appellant followed the minor when she went to get some nappier grass, lowered her innerwear and raped her. On 9.9.2020, she woke up early with the minor, and they went to hospital. They arrived at 7.30 a.m. They later reported to Múkûrwe'inî Police Station. On cross-examination, it was her case that the minor only told her of the money. The Appellant was arrested in her presence.
 13. PW4 was Eliud Mathu Mwangi, Sr. Assistant Chief of Kariara sublocation. On 10.9.2020, he received a call from PW3 who informed him that PW2 had been defiled by a known person. He advised her to report to Kangurue police post. On 14.9.2020, he received a call from PC Munene who asked him to lead PC Yusuf and Munene to the home of the Appellant. They found the Appellant and his wife at 10 p.m. He was arrested and escorted to Múkûrwe'inî police station. On cross-examination, he testified that the Appellant was arrested on 15.9.2020.
 14. PW5 was Dennis Ngwanyo Seleno, a Clinical Officer. According to him, the minor was 12 years. The hymen was freshly broken. Whitish discharge was seen. No laceration was seen on both labia. Numerous pus cells and blood cells were seen. He concluded that there was penetration.
 15. PW6 was No. 63909 PC Munene of Kangurwe Police Post. He testified that the report was made on 10.9.2020 at 9 a.m. PW2 and PW3 made the complaint. He issued the P3 Form. PC Yusuf accompanied him to the Appellant's home, and they arrested the Appellant at about 11 pm. They got to the station past midnight, so it was 15.9.2020. He went and photographed the scene on 19.9.2020. On cross-examination, he testified that he had investigated the matter and had reason to believe the Appellant was the culprit, which led to the arrest.
 16. The Appellant also testified on oath as DW1. He testified that on the material day, he was at the Mbugua area for work from 8 a.m. He retired home at 6 pm. He has been working with Douglas Maina since 2.4.2020. He would give Anthony Maina Ksh. 1,000/= for each lorry of sand sold. He was arrested on 14.9.2020 at 8 p.m. On 15.9.2020 he was transferred to Múkûrwe'inî police station. He was at work at 5 p.m. He did not meet with the minor or commit the offence. PW3 had once informed him that he would be arrested over his child getting along with the minor.
 17. DW2 was Douglas Maina. He worked with the Appellant from 2.4.2020 until his arrest. They had leased a sand quarry from one Anthony Maina. They would pay Ksh. 1,000/= per lorry of sand. On 3.9.2020, they were on duty. The Appellant only rested on Sundays. On 15.9.2020, the Appellant did not report to work. He used to walk to work.
 18. DW3 was Anthony Maina. He leased a quarry to the Appellant from 2.4.2020 to September 2020. They worked from 8 am to 6 pm, daily except Sundays. On 15.9.2020, he found only DW2 at work. On cross-examination, he testified that the Appellant stayed 3 km away.

Submissions

19. Only the Appellant filed undated submissions forwarded on 19.08.2025 by prison authorities. It was submitted that the trial court erred in failing to follow Section 200 of the Criminal Procedure Code. Reliance was placed inter alia on Joseph Kamara Maro v Republic (2014) eKLR based on which it was submitted that the Appellant's right to a fair trial was consequently breached. In that case the Court of Appeal held that:

Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The



position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that “this provision does not oblige the succeeding magistrate to start de novo” but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code.

20. The Appellant further submitted that the elements of the offence of defilement were not fulfilled and the conviction was erroneous. Particularly, it was submitted that age and penetration were not proved. It was submitted further in this regard that absence of the hymen was not evidence of penetration. The Appellant cited *Michael Odhiambo V Republic* [2005] KEHC 3215 (KLR), where D. Musinga, J as he then was held as follows:

The rapture of the hymen per se was not conclusive proof that PW1 had been defiled. The Doctor testified that rapture of hymen in small girls could be caused by other factors. He said that vigorous play could not cause complete rapture.

21. HCCRC Case No. 280 of 2004– *Michael Odhiambo v Republic*.
22. It was also submitted by the Appellant that essential witnesses did not testify. Reliance was placed on Section 143 of the *Evidence Act* and the case of *Bukenya v Uganda* based on which it was submitted that this omission was fatal to the prosecution case.
23. The Appellant submitted that his defence was not considered. He cited the court of appeal case of *Ouma v Republic* (1986) KLR 619.

Analysis

24. 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 stated 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.

1. 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.

26. The legal burden is the burden of proof. It 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.

27. Brennan J, addressed the standard of proof required in criminal cases in 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.

28. 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.

29. 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.

30. 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.

31. The most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

32. 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. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant’s guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. 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.”



33. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant was up to imprisonment of 20 years as per section 8(3) of the *Sexual Offences Act*. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for a large part of his life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on undoubted evidence.
34. However, before I venture into the reevaluation of the evidence, if need be, the court notes that there were two trial magistrates who changed in the course of the proceedings. Honourable E.N. Angima who previously conducted the proceedings left and Hon. D.N. Bosibori took over. This was after the close of the prosecution's case. The trial court's record does not indicate that Section 200(3) of the Criminal Procedure Code was complied with. I therefore delve into the effect of these on the appeal. Section 200(3) of Criminal Procedure Code provides as follows:
- “Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”
35. On the importance of compliance with the said procedural requirement, in the case of Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others, High Court at Siaya, in Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR, Makau J rightly expressed himself while considering whether Section 200 (3) of the Criminal Procedure Code was unconstitutional. The learned Judge delivered himself thus: -
- “Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision... Section 200 (3) of the Criminal Procedure Code was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of *the Constitution* of Kenya, 2010.....
36. Consequently, the correct procedure which the trial court omitted would be to inform the Appellant of his right under Section 200(3) Criminal Procedure Code and let him indicate his preference to the court. If the Respondent had any objection to the Appellant's election, the court should have heard them out and then ruled on the matter giving its reasons. In the case before me, the court appears to have taken over the proceedings as though it was the same one magistrate who initiated and proceeded to the end when in fact a new magistrate had come in and taken over the proceedings. As Achode J (as she then was) observed in *Joshua Mutitu Maina v Republic* [2014] KEHC 8415 (KLR):
- More important however, was the failure of the trial court to observe the provisions of Section 200(3) Criminal Procedure Code. The record of the court does not demonstrate that when the case passed from Hon. Ademba Resident Magistrate to Hon. Okundi Senior Resident Magistrate and later still to Hon. T. Murigi the principal magistrate, the provisions of Section 200(3) Criminal Procedure Code were given due regard. There was no ruling by either of the two subsequent magistrates on the issue...



Miss Nyauncho learned counsel, was therefore wise to concede the appeal on behalf of the Respondent, for reasons that Section 200(3) Criminal Procedure Code was not complied with.

37. It cannot be overemphasized that it is the duty of the Court to inform an accused person of his rights under Section 200 (3) Criminal Procedure Code. In the case of John Bell Kinengeni –vs- Republic [2015] eKLR the Court of Appeal stated thus:

“In Richard Charo Mole Nairobi Criminal Application No. 135 of 2004, this Court approved the principles set in Ndegwa – vs – Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is no requirement that an application made by the accused person for such compliance and that failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200 (3) required in a mandatory tone that the succeeding Magistrate (read Judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding Magistrate. In Cyrus Muriithi Kamau & Another –vs- Republic Nyeri Criminal Application No. 87 and 88 of 2006. The court added that the use of the words “shall inform the accused person of that right” in Section 200 (3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial Magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the Magistrate in mandatory terms. In Bob Ayub Alias Edward Gabriel Mbwana alias Robert Mandiga (supra), the court ruled that mere mention in the judgment that Section 200 (3) was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law”.

38. The Appellant’s right to a fair hearing under Article 50 of *the Constitution* was therefore infringed by the failure by the succeeding magistrate to comply with Section 200(3) of the Criminal Procedure Code. In essence all the subsequent proceedings which involved the hearing of the Appellant’s case were veiled with that unconstitutionality and cannot stand in law. I therefore, will not deem it necessary to deal with the grounds in this appeal alluding to the merits of the findings of the trial court.

39. This court is, however, alive to the position that it is not in all situations of failure to comply with Section 200 (3) Criminal Procedure Code that the trial will lead to an acquittal. In the case of Michael Waweru Ndegwa Criminal Appeal No. 290 A of 2010, which was later confirmed on appeal vide Ndegwa v Republic [2024] KECA 294 (KLR) by the Court of Appeal (W Karanja, J Mohammed & AO Muchelule, JJA). In the high court case, Mativo J, as he then was, held as follows:

“This court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding Magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be born in mind before invoking Section 200 Criminal Procedure Code include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the Prosecution or the accused.”.



40. This court has also held that the provisions of Section 200 Criminal Procedure Code ought to be used very sparingly, and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice. This was in *Ndegwa –vs- Republic* (supra) where the court stated as doth:

“The provision of Section 200 Criminal Procedure Code ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.”

41. The cases however, involved whether to start de novo or not. In this matter, the subsequent court proceeded in total disregard of the said section. In the circumstances, failure to comply with section 200(3) was fatal to the prosecution case.

42. The last prosecution witness testified on 9.8.2021, four and a half years ago, and the court is in doubt whether all the witnesses are still available and with their earlier memories. The Respondent had also concluded its case, and there is a likelihood of getting an opportunity to fill up the gaps. Therefore, a retrial would be prejudicial to the Appellant. For the foregoing reasons, I find that this appeal must succeed on this ground.

43. The case is therefore incurably bad both on merit and on the technicalities. Defects in procedure under section 200(4) require as follows:

Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

44. Before giving the way forward, the court will first look at the merit of the case. The alleged offence took place on 3.9.2020. There were no threats to the complainant, but she did not report them. There was no medical evidence connecting the appellant to the alleged offence. It is hard to explain the perfunctory nature of the judgment delivered in respect of this matter. The subsequent court did not have the advantage of hearing the prosecution’s witnesses. There are notes by the trial court on the demeanor of the witnesses, in particular the minor. It is therefore not intellectually honest for the court to rely on Section 124 of the *Evidence Act* as a succeeding court. Such reliance is a misdirection and unfounded in law. While addressing the question of a succeeding court, Kiage JA stated as follows in the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR):

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



45. The conclusions of fact, therefore, for the succeeding magistrate are the same as those of this court, except as far as it is related to the defence case witnesses. By failing to let the former magistrate, the succeeding court lost the observations on the witnesses' demeanor. The court warned itself of the danger of relying on a witness. The court then proceeded, without reason, to find that the complaint was candid. In the absence of compliance with section 124, the state required the evidence of the complaint to be corroborated.
46. It is unfortunate that the complaint was brought so late in the day. Medical evidence could not corroborate the charge of defilement. No other witnesses placed the appellant at the locus in quo. As a fact, the defense witnesses placed the appellant away from the scene. The prosecution's evidence clearly showed that the police were told he usually arrived home late. That is why an ambush was laid past midnight. The prosecution's evidence essentially corroborated the defense's evidence that he always came home late.
47. Second, the court first found that the offence was proved in all the indictments before considering the defence. 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 about the defence evidence, as it was made after the appellant's conviction. The finding of guilty is at paragraph 33 of the judgment. The court then started considering whether the appellant was the perpetrator. This was a misdirection as the court had already made a finding 6 paragraphs earlier.
48. The court relied on the minor's evidence that she alerted her mother on 6.9.2020. However, the reason the minor gave for not alerting the mother was that the mother was not at home until Sunday. However, on cross-examination, she stated as follows:
- On. 3.09.2020, I found Kugwa after leaving the shop. Mum had sent me to the shop. I left her at home, and when I came back, she was still there.
49. Contrast this with the evidence in chief:
- I just took my items and went home, that is the shop purchases. I didn't tell mum that day because she was not at home.
50. Such a witness is not credible; her evidence is of no use. She must not choose which truth to say. Evidence that lies and speaks from both sides of the mouth is totally unreliable. A witness who lies cannot have his testimony relied on in any way. In the absence of such testimony, the conviction was unsafe. In the case of Michael Muriithi Kinyua v Republic [2002] KECA 315 (KLR), the court of appeal [Chunga CJ, Tunoi & Lakha JJ A], 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.
51. The defence evidence was not considered at all, other than being classified as an afterthought. The appellant has not had a chance to tender evidence except at the defence hearing. The appellant has no duty to prove his innocence. Therefore, there is no disclosure required of him; the court therefore curtailed the appellant's right to a fair trial, which is immutable and cannot be derogated from, such a trial is soiled that cannot be salvaged.
52. At paragraph 61 of the judgment, the court placed the burden of proving the truthfulness of the alibi of the appellant. He had no such duty. The duty to prove the falsity of the alibi defence is on the state.



After placing the burden on the defence, the court then proceeded to lay the correct law on alibi. It is beyond doubt that the court was minded to convict the appellant, whether or not there was evidence. The court below thus ignored an authority it used in its judgment without any basis at all. In the case of Bernard Odongo Okutu v Republic [2018] KEHC 1052 (KLR), which she referred, R. E. Aburili held as follows:

109. On Issue 6, the appellant claims that his defence of alibi was not considered in his favour. On the Appellant's defence of alibi, the appellant complained that his defence of alibi was not considered by the trial magistrate. In the case of Charles Anjare Mwamusi V. R CRA No. 226 of 2002 the Court of Appeal stated:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25.”

110. I thus take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see Ssentale vs. Uganda [1968] EA 36-. The foregoing was restated in the case of Wang'ombe vs. Republic [1976-80] 1 KLR 1683 where it was stated “the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt.”

111. However, this defence should also be raised at the earliest opportune time as was held in the case of R VS SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6EACA 145 that:

“ if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

112. And in the case of Victor Mwendwa Mulinge vs Republic, the Court of Appeal rendered itself on the issue of alibi thus:-

“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; see Karanjavs Republic, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought”

53. The same was confirmed in the case of Ogutu v Republic [2025] KECA 336 (KLR).

54. 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.

55. The appellant did not just raise an alibi. He gave the continuum of evidence accounting for his whereabouts and had witnesses in tow. Even where an alibi is raised late, the court has a duty to consider the same law and where it was not contested. When placing an alibi defence, an accused does not thereby assume the duty to prove the same. The one issue the court failed to address critically was the defence evidence. 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.”

56. 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.

57. 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.

58. The appellant was not under duty to disclose his defence before being put on the defence. In any case, the State may call rebuttal witnesses. The appellant’s case, as presented in cross-examination, was that he was not there. It used to be the position that an alibi had to be disclosed in advance. However, non-disclosure is not fatal.
59. 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.
60. 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.
61. 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.



62. The minor testified regarding the alleged incident that occurred several days before she was examined. I have already found her evidence not credible. Even in absence of defence evidence the prosecution case was for dismissal.

63. Medical evidence showed there were no injuries. 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.

64. 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.

65. 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.

66. It is true that the appellant was prejudiced. However, the evidence overall was full of holes and could not sustain a conviction. The court cannot order a retrial to allow the prosecution to fill the gaping craters in the evidence. The appellant is entitled to the benefit of the doubt. In the circumstances, I find the conviction unsafe and, consequently, set it aside.

67. It is unnecessary to deal with sentence in the absence of proof of the offence.

Determination

68. In the upshot, I make the following final orders:-

- i. This appeal is allowed in its entirety.



- ii. The conviction and sentence is set aside.
- iii. The Appellant is set free unless otherwise lawfully held.
- iv. The appellant be removed from the register of sexual offenders.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF FEBRUARY, 2026.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Kaniu for the State

Appellant – present

Court Assistant – Michael

