Wamwea v Republic (Criminal Appeal E046 of 2025)
[2026] KEHC 1838 (KLR) (18 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1838 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E046 OF 2025

DKN MAGARE, J

FEBRUARY 18, 2026

BETWEEN

KENNEDY MURIUKI WAMWEA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the Judgement of the Trial Court, Hon. E. Kanyiri, Senior Resident Magistrate in Karatina PMCSO No. E012 of 2021)

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. E. Kanyiri, Senior Resident Magistrate in Karatina PMCSO No. E012 of 2021.

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 24.5.2021 in Mathira East subcounty of Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of AWW, a child aged 14 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 24.5.2021 in Mathira East subcounty of Nyeri County, the Appellant intentionally and unlawfully used his fingers to penetrate the vagina of AWW, a child aged 14 years.

4. The Appellant was arraigned in court on 26.05.2021, and he denied the charges. A plea of not guilty was consequently recorded. He was granted Ksh 600,000/= bond.

5. The Trial Court considered the case and rendered the Judgement on 16.6.2025. The Court found the Appellant guilty and convicted him of the offence of defilement. The Appellant was also sentenced to 20 years imprisonment.

6. The Appellant, aggrieved, lodged this Appeal. The Petition of Appeal dated 25.8. 2025 raised six grounds of appeal. The gist of the appeal is that the trial court erred in law and fact in convicting the Appellant when the elements of the offence of defilement were not proved at all. It was also pleaded that crucial witnesses were not called, and the evidence of the witnesses who were called was marred with inconsistencies and contradictions. The court was also blamed for not considering the Appellant's defence.

Evidence

7. PW1 was the minor who gave sworn evidence and stated that she was 15 years old and in class 8. She stated that her birth certificate indicated that she was born on 25.12.2006 but her mother told her this was wrong as the correct date was 24th December. According to her, the Appellant was her boyfriend.

8. She stated that on 24.5.2021, she went to Kibingoti with the Appellant. He was a boda boda rider, so he ferried her. She wanted to see his home. They arrived at 5.30 p.m. It was a three-roomed house with a living room, kitchen, and bedroom. She asked to leave at 7 p.m but the Appellant held her back. He asked for sex but she declined.

9. The complainant testified that the appellant persisted until she eventually agreed. At his suggestion, she went to bed. The appellant removed his trousers, shirt, and other clothing and questioned why she had not undressed. She removed her sweater, then took off her trousers and underpants. He did not penetrate her with his penis. However, he touched her vagina and inserted his fingers into it. She stated that this was the first time he had done so. The incident occurred at about 7.00 p.m. Thereafter, she asked him to take her home. They left, but upon arrival, she became apprehensive that her mother would take offence. They then returned to the appellant's house

10. Later, a man identified as Gichuki came and told the Appellant that the minor was being searched. The Appellant advised her to go and hide and she ran into the nearby trees. After she came back, she found the Appellant's house locked. She went to a neighbour whose name she could not recall. He told her that he was the Appellant's friend, so he allowed her to sleep on his couch as he slept on his bed. In the morning, her brother came to her, and she was taken to Karatina Police Station.

11. On cross-examination, she stated that she had gone to watch the road construction. She agreed to go to the Appellant's home. No one saw her go onto the Appellant's house. The Appellant did not sex with her. She had never had sex with anyone else. She was, according to her, a virgin. When he inserted fingers in her vagina, she did not feel pain, scream, or bleed.

12. PW2, was FMW. PW1 was his sister. On 24.5.2021, her other sister, J told him that PW1 was not home. It was 8 p.m. He went to Kibingoti. He saw PW1 on a motorbike. The Appellant was riding. He had not known the Appellant's name, but he had previously seen him. Fellow bodaboda riders refused to give him their mobile numbers, but he went to the assistant chief, who then went to the Appellant's home with them. The Appellant did not disclose PW1's whereabouts. They opted to go to the police station to report. He was advised to look for her. In the morning, he found her. She told her she was at the Appellant. he took her to the police station.

13. PW3 was MMMW, the mother of PW1. She testified that PW1 was born on 24 December 2006. On 24 May 2021 at about 7.00 p.m., she returned home and found that PW1 was not there. She made inquiries in the neighbourhood, but no one could account for PW1's whereabouts. Later, one of her children, FX, informed her that he knew where PW1 was. According to him, PW1 was at the appellant's house. FX had gone there with the assistant chief. Subsequently, the appellant was taken to the police station.

14. PW4 was Dr. Stephene Nderitu of Karatina County Hospital. He produced the PRC, which was filled by Annavella Wambui Wachira on 25.5.2021. He also produced the P3 form. On examination, the hymen was broken. There was no physical injury. On cross-examination, he testified that it was not indicated whether the broken hymen was fresh or an old broken one. There was also normal vaginal discharge. According to him, penetration was proved as the hymen was broken.

15. PW6 was No. 10xxx PC Lillian Layo. She was the investigating officer. She took PW1 to the hospital. Based on the statement of PW1 and medical evidence, she had reasonable suspicion that the Appellant was the offender and so arrested and charged him.

16. The appellant testified on oath as DW1. He stated that on 24 May 2021 he was travelling home from Sagana and arrived at about 8.30 p.m., reaching his house at around 9.00 p.m. Shortly thereafter, the assistant chief came to his house with PW2. They informed him that he was alleged to have been with a girl. He testified that they assaulted him and that no sweater or other clothing belonging to a girl was recovered from his house. He denied inserting his finger into PW1's vagina or committing any unlawful act against her. He further contended that if any incident had occurred in Kirinyaga, then he ought not to have been arraigned before the present court.

Submissions

17. The Appellant filed submissions dated 9.10.2025. It was submitted that the charges preferred did not corroborate with the evidence of PW1 and PW4. The Appellant also 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.

18. It was further submitted that the absence of a hymen is not, of itself, proof of penetration. In support of that proposition, the appellant relied on Fappyton Mutuku Ngui v Republic, (2010)eKLR, where the court observed that the mere absence of a hymen does not conclusively establish that penetration occurred.

19. It was the appellant's submission that the prosecution case was riddled with material contradictions, particularly in the evidence tendered by PW1 and PW2. He contended that the inconsistencies in their respective testimonies cast doubt on the credibility and reliability of the prosecution's case.

20. Finally, the Appellant contended that his defence was not considered.

21. On sentence, he submitted that the sentence of 20 years was excessive and harsh.

22. The Respondent did not file submissions.

Analysis

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. in Pandya -vs- Republic [1957] EA 336 is 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.

24. The same duty was set out in the locus classicus case of Okeno v Republic [1972] EA 32 at 36, where 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."

25. The issue in this case is whether the prosecution proved its case to the required standards. 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."

26. 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."

27. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it 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."

28. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 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 stigmatised 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."

29. 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."

30. 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."

31. 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.

32. PW1 and PW4 were the most crucial witnesses for the Respondent and their evidence would make or unmake the case against the Appellant. The Appellant remained innocent until otherwise proved guilty. In proving the case against the Appellant, the Respondent had the burden to dislodge the 3 key ingredients of the offence of defilement as held in George Opondo Olunga v Republic [2016] eKLR which are:

    i. proof of the age of the complainant,

    ii. proof of penetration and

    iii. proof that the appellant was the perpetrator of the offence.

33. this being a sexual offence, the same is provided under Section 8 of the *Sexual Offences Act* as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) The accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may, upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

34. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

35. Age had to be proved just like penetration and identity for a conviction to be sustained. However, age is important not just for conviction but also for punishment as the offence of defilement has a graduated sentence. proving that a victim is below 18 is sufficient to establish the offence of defilement. However, the exact band will be crucial when deciding on a sentence. The court will not acquit simply because the child is said to be slightly older than the charge she says. However, the punishment will be determined by the victim's age. The upper limits in each of the subsections of Section 8 of the sexual offences are below 18 years, below 15 years and below 11 years. In the case of Kaingu Elias Kasomo vs. Republic Malindi, the Court of Appeal in Criminal Appeal No. 504 of 2010 stated as follows:

Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

36. The 3 ingredients were reiterated in Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

37. In this case, age was proved by a birth certificate. It is dated 13.2.2018 and was registered on 31.12.2006, stating that PW1 was born on 24.12.2006. I have no doubt that the age was proved to the required standard. The Court of Appeal in the case of Edwin Nyambogo Onsongo Vs Republic (2016 eKLR stated as follows on the proof of age:

> " ... the question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism, card or by oral evidence of the parents or the guardian or medical evidence among other credible form of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age it has to be credible and reliable.

38. Turning to identification, in R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated doth:

> The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...

39. In this case the evidence of identification was by PW1 and PW2. PW1 testified that she knew the Appellant as her boyfriend. PW2 testified that though he had not previously known the Appellant by name, he had seen him at the boda boda base and confirmed when he visited the Appellant's home with the assistant chief. The Appellant, though, testified that he had never met PW1, and PW2 conceded that PW2 and the assistant chief came to his home to ask for PW1. He also disputed that he was a boda-boda rider.

40. On penetration, PW1 testified that the Appellant did not penetrate her genital organs. The Appellant touched her vagina and inserted his fingers therein, and that was all. This was the first and only time. The medical evidence corroborated PW1's evidence. It was noted that the hymen was broken. There was normal vaginal discharge, and there were no physical injuries noted to the genitalia.

41. Stemming from the evidence of PW1 and PW4, the court erred in finding that penetration was proved. In defining the meaning of penetration and genital organs, Section 2 of the *Sexual Offences Act* stated as follows:

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person; genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

42. Further, Section 8(1) of the *Sexual Offences Act* provided as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

43. A conjunctive reading of the above sections of the law demonstrated that for the offence to be termed as defilement, there ought to have been penetration of the genital organ of PW1 by the genital organ of the Appellant, whether complete or partial. PW1 denied such penetration, and it was her clear testimony that only the hand touched her vagina and the fingers were so inserted therein.

44. Therefore, the offence as charged was not proved. The Respondent entered its own arena at parity with the offence charged and wandered into a path so inconsistent with the offence charged by laying evidence that revealed a completely different offence than what the Appellant was charged with.

45. On a similar sway and frolic, the Respondent did not charge the Appellant with an offence relating to an indecent act, in the alternative. The charge sheet was grossly erroneous as it referred to an alternative charge of indecent act with a minor but described particulars relating to the Appellant using his fingers to penetrate the vagina of PW1. This was clearly an offence under sexual assault and not an indecent act. The relevant offence was stated in Section 5 of the *Sexual Offences Act* as doth:

Section 5(1)(a) (1) and (2) of the *Sexual Offences Act*

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years, but which may be enhanced to imprisonment for life.

46. The question, therefore, is whether the court can redraft the charge of indecent act and deal with the identity of the appellant. The section for which the appellant was charged for the alternative count under section 11 of the *sexual offences Act* as follows:

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

(2) It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

(3) The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

(4) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (Cap. 92) and the Children's Act (Cap. 141)

(5) The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

47. The court failed to consider that, without evidence of penetration by a genital organ, defilement could not be proved. In any event, the trial court also got it wrong when it convicted the Appellant solely on the evidence of the absence of a hymen. On the broken hymen, the evidence in the PRC Form and P3 Form was inadequate. There was no indication as to the possible age of the broken hymen, and noting that there was no result on the presence or otherwise of epithelial cells, pus cells, or any unusual discharge, the court erred in following the conclusion by PW4 that merely because the hymen was broken, penetration was proved.

48. In my view, medical evidence is empirical and must be based on scientific findings that support a given conclusion in relation to the offence. It was not enough to the medical doctor to suggest defilement but fail to link the nature of the injuries sustained by the minor to defilement. It appears that the trial court based the conviction of the Appellant on the absence of the hymen.

49. The broken hymen and vaginal injuries must be linked to penetration by the Appellant to sustain a conviction. This is because scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. As appreciated by the Court of Appeal in P.K.W v Republic [2012] eKLR:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"
>
> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and

medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.

17. In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.

18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held."

50. It is unnecessary to consider whether the appellant is the one who allegedly committed the act. It is not in doubt that the minor was sleeping in a different place. The appellant was sleeping in his own house. The witness having not been called, it follows that there was no evidence that the offence as charged was proved. Having found no penetration, the offence as charged was not proved, the appeal against the conviction is allowed.

51. The last part is whether the state ought to have called the person in whose house the minor slept on the fateful night. It does not make any sense if the appellant was a boyfriend to let the 'girlfriend' sleep with another friend while the appellant is alone. Medical evidence does not place the appellant in the same place as the appellant.

52. The place the minor was taken from had a person who was of interest. Is it possible that the minor was shifting the blame to the appellant to avoid identifying the real culprit, the man whose house the minor slept in? Section 143 of the *Evidence Act* provides as follows:

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

53. There is no requirement to call a superfluity of witnesses. However, there must be at least a bare minimum of witnesses to prove a charge. Where key witnesses are not called, and the case is wholly, then an adverse inference must be made for failure to call such. In this case, failure to call the owner of the house where the minor slept, there is doubt if the appellant was the one involved with the minor. It is not possible to sleep in a house whose owner one does not know. In the case of Donald Majiwa Achilwa and 2 other v R (2009) eKLR, the Court stated:

> The law, as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of those witnesses' evidence may be adverse to the prosecution's case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution's case, and the prosecution withholds a witness, the court, in an

appropriate case, is entitled to infer that had that witness been called, his evidence would have tended to be adverse to the prosecution's case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

54. The foregoing had earlier been dealt with in the case of Keter v Republic [2007] 1 EA 135, the court held inter alia:

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

55. In the circumstances, failure to call the householder where the minor slept. Court must make an adverse inference that if she had been called, her evidence would have been adverse to the prosecution. The medical report did not show defilement. the person allegedly defiled denied being defiled. The court has no business deciding facts which the complainant had denied having happened.

56. Having found the conviction unfounded and set it aside, I find no utility in addressing the issue of sentence.

Order

57. In the upshot, I make the following final orders:

    i. This Appeal is allowed. The conviction and sentence is set aside. In lieu thereof, I make an order that the Appellant is set free unless otherwise lawfully held.

    ii. The Appellant is removed from the register of sexual offenders.

    iii. 14 days right of appeal.

    iv. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH 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