JOW v Republic (Criminal Appeal E025 of 2024) [2026] KEHC 3019 (KLR) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 3019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E025 OF 2024

OA SEWE, J

FEBRUARY 19, 2026

BETWEEN

JOW .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of Hon. J.M Nang'ea, Chief Magistrate, delivered at the Chief Magistrates' Court at Homa Bay in Criminal Case No. S.O.A E012 of 2023 on 14th November 2023.)

JUDGMENT

1. The appellant, JO Were, was arraigned before the lower court on the 11th March 2023, charged with two substantive counts. In the first count he was charged with incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars were that on 11th March 2023 at [Particulars Withheld] in Homa Bay Sub County within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.A., a child aged 15 years who to his knowledge was his niece who was mentally challenged.

2. In the alternative, he was charged with committing an indecent act with a child contrary Section 11 (1) of the Sexual Offence Act No. 3 of 2006; in that on 11th March 2023 at [Particulars Withheld] in Homa Bay Sub County within Homa Bay County, he intentionally touched the vagina, breast and buttocks of A A a child aged 15 years who had a mental disability.

3. In Count II the appellant was charged with deliberate exposure to HIV infection contrary to Section 24(2) as read with Section 24(3) of the HIV & AIDS Prevention and Control Act. The particulars thereof were that on 11th March 2023 at [Particulars Withheld] in Homa Bay Sub County within Homa Bay County, having knowledge that he was HIV positive deliberately exposed A A to the risk of becoming infected by defiling her.

4. The appellant pleaded not guilty the charges. Upon trial, the appellant was found guilty of Count I and acquitted of Count II in a judgment delivered on 14th November 2023. The appellant was accordingly sentenced on 23rd April 2024 to serve life imprisonment in respect of Count I.

5. Being dissatisfied with the decision of the trial court, the appellant filed this Appeal on the grounds that:

    (a) The learned trial magistrate misdirected himself in several matters of law and fact.

    (b) The learned trial magistrate erred in law convicting the appellant for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* which was not proved beyond reasonable doubt by the evidence adduced by the complainant and prosecution.

    (c) The learned magistrate misdirected himself on the law of evidence in convicting the accused while relying only on the evidence of the minor which was not corroborated by other material evidence in support thereof implicating the accused.

    (d) The learned trial magistrate misdirected himself on the law of evidence in failing to take cognizance of the evidence adduced by prosecution witnesses on cross-examination or to take note of the contradictions arising out of such cross examination.

    (e) The learned trial magistrate erred in the law of evidence in failing to note the demeanour of the prosecution witnesses and the fact that they were all adducing rehearsed evidence in order to sustain the continued detention and subsequent conviction of the appellant.

    (f) The learned trial magistrate erred in law of evidence and thus arrived at an erroneous decision, in that;

        (i) He failed to take into consideration the fact that despite the prosecution claiming that the accused person had intention to infect the minor with HIV/AIDS no tests were conducted on him; fact confirmed by the clinical officer.

        (ii) He failed to note that it was only the child who was tested and yet the charges preferred against the accused person required tests on both the minor and the accused.

        (iii) He failed to take into consideration and or interrogate the fact that despite the child indicating that on the first encounter of defilement she informed her mother, grandmother and Mama J, none of the said persons were called upon by the prosecution to testify and/or corroborate the minor's evidence.

        (iv) The child's evidence was not corroborated to confirm beyond reasonable doubt that the appellant was indeed the one who defiled the child.

        (v) He failed to take into consideration the fact that the child might have been defiled by a person other than the appellant or that the hymen may have been broken through other means under different circumstances.

    (g) The learned trial magistrate erred in law of evidence in placing the burden of proof on the accused person contrary to the dictate of criminal law.

    (h) That the learned trial magistrate erred in fact and in law in disregarding the defence of alibi raised the appellant at trial without any basis and on reason at all.

(i) The learned trial magistrate erred in law of evidence in evaluating the evidence of the prosecution in isolation and then considered whether or not the case for the defence rebutted or casted doubt on that of the prosecution.

(j) The learned trial magistrate erred in law of evidence in arriving at a conviction for an offence under Section 20(1) of the *Sexual Offences Act* against the weight of evidence.

6. The appellant urged the court to quash his conviction and acquit him of all the charges herein.

7. Directions were given thereafter on 1st October 2024 for the appeal to be canvassed by way of written submissions. Whereas the respondent complied and filed submissions dated 20th March 2025, the appellant did not.

8. In the main, the respondent submitted that all elements of incest were proved beyond reasonable doubt. The respondent relied on the testimony of PW1 and PW4 whose evidence it was that the appellant is the complainant's uncle; he being a brother to her father. The respondent also submitted that PW1 narrated how, with the permission of her mother, she went to the appellant, a pastor, for prayers because she was suffering from insomnia; and that instead of prayers the appellant proceeded to defile her. The respondent also relied on the evidence of the Clinical Officer (PW3) who examined PW1 and confirmed that her hymen was freshly broken, and noted the presence of fresh blood on the vagina along with epithelial cells. In the respondent's submission, penetration was proved to the requisite standard.

9. The respondent also submitted that the appellant was positively identified by the complainant, granted that, as her uncle, he was well known to her. The complainant further submitted that the incidents occurred during the day, and therefore nothing obstructed the complainant's ability to see clearly on the two occasions when she was defiled by the appellant.

10 The respondent also submitted that the age of the complainant was well proved to demonstrate that she was born in 2007, and was therefore 16 years old at the time of the incident. Reference was made to the Age Assessment Report produced by PW2, which confirmed that the minor was then aged between 15 and 16 years.

11 Regarding the contention by the appellant that he was convicted on the basis of uncorroborated evidence of a minor, the respondent submitted that Section 124 of the *Evidence Act* allows a conviction in sexual offences based solely on the victim's testimony if the court believes it to be truthful. It was also their submission that that the medical evidence by PW3 confirmed a fresh tear on the complainant's hymen, thereby corroborating her account. Thus, the submission of the respondent was that their evidence before the lower court was credible, consistent and well corroborated, and that any alleged contradictions, if they existed, did not affect the core of the case.

12 I have given careful consideration to the appeal and taken into account the written submissions filed herein by the appellant and learned counsel for the State. I am mindful that, in a first appeal such as this, the Court is under obligation to evaluate the evidence adduced before the lower court and come to its own conclusions thereon. In Okeno v Republic 1972 EA 32 the Court of Appeal for East Africa held that:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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 also Reuben Ombura Muma & Another vs. Republic 2018 eKLR)

13 I have consequently perused and considered the evidence presented before the lower court. The respondent called four witnesses. PW1 was the complainant, a 16-year-old girl who was then a Grade 6 pupil at [Name Withheld] Primary School. She stated that the appellant was a pastor at Ebenezer Church, which operated from his home. She narrated that she visited the appellant's home for prayers because she was unwell and was suffering from insomnia. The appellant, who was with his wife at the time, promised to visit her. On Saturday morning, he went to her home, and with her mother's permission took her to his house for prayers, arriving there at about 9.00 a.m.

14 It was the evidence of PW1 that when they entered the house, the appellant's four wives remained outside. The appellant then locked the door and proceeded to defile her, after which he cautioned her not to tell anybody of the incident. PW1 further testified that the appellant visited their home the following day, which was a Sunday, and instructed her to go to his house for further prayers. She went as directed, and he followed her and defiled her a second time and warned her not to reveal the act to anyone.

15 PW1 also mentioned that the appellant's youngest wife, known as Mama J, later questioned her, expressing doubt as to whether the accused had actually been praying, as she had not heard him pray. PW1 told the lower court that she revealed to Mama J that the appellant had defiled her under the pretext of prayers. The reported the matter to her mother and grandmother who caused the incidents to be reported to the area chief. She was taken to Homa Bay Police Station, after which she was examined at Homa Bay Teaching and Referral Hospital. She confirmed that the appellant was her uncle, being her father's brother.

16 PC Lydia Magiya was the investigating officer in this matter. She testified before the lower court as PW2, and confirmed that on 13th March 2023 she received a phone call from the area chief informing her of a complaint involving a minor who had allegedly been defiled. The chief brought both the victim and the suspect to the station and she observed that the victim was mentally challenged. PW2 stated both the girl and suspect were taken for a medical examination where it was confirmed that she had been defiled. PW2 further testified that the girl was also subjected to an age assessment and a report prepared which showed that she was between 15 and 16 years old. The report was produced as the Prosecution's Exhibit 1 before the lower court.

17 The Prosecution's third witness was Carolyne Atieno Obonyo (PW3), a clinical officer attached to Homa Bay Teaching and Referral Hospital. She testified that she examined the complainant on 13th March 2023 after the child was brought in by her parents and police officers. She further stated that she had been informed that the child was mentally challenged and was reportedly suffering from hallucinations.

18. She stated that upon examination she noted that the complainant's external genitalia appeared normal, but the hymen was freshly broken. She observed the presence of fresh blood in the vagina along with numerous epithelial cells. She produced the Medical Report dated 13th March 2023 as the Prosecution's Exhibit 2, the PRC Form as the Prosecution's Exhibit 3 and the treatment notes as the Prosecution's Exhibit 4. She added that urinalysis showed that there were yeast cells, but no STDs were detected.

19 PW3 testified that the complainant's age was also assessed in the hospital by a dentist and the report produced before the lower court as the Prosecution's Exhibit 1. On cross-examination, PW3 testified

that it was the accused who informed them that he was HIV positive and that he was not retested, as there is no requirement to retest known HIV-positive cases.

20 Paul Nelson Omondi, the area chief of Kothidha North Sub Location, Homa Bay County, testified as PW4. His evidence was that on 13th March 2023 in the morning, he received a call from a member of the public informing him of the defilement of a child in his area. He was informed that the incident occurred on 12th March 2023. He stated that, on his way to the home of the complainant's parents, he met the complainant in the company of members of the public. He escorted them to Homa Bay Police Station for investigations to be conducted by the Police. Thereafter, the Police instructed him to arrest the suspect, who was said to be a relative of the victim.

21 PW4 further stated that, upon learning that some villagers were planning to attack the suspect whose name was given to him as JO, he rushed to the suspect's home to rescue him and found him being assaulted by an irate mob. He managed to calm the crowd down, and they accompanied him and the suspect to Homa Bay Police Station, where he handed the suspect over to the Police. PW4 mentioned that the suspect, the appellant herein, was a person well known to him, who had previously requested to be appointed as a village elder. He also confirmed that he was aware that the appellant conducted prayers at his home for those in need of such prayers.

22 In his defence, the appellant testified that he was arrested on 13th March 2023 at around 8.00 a.m. at his home by the area chief and was taken to the police station where he was accused of defilement. He pointed out that the complainant's Birth Certificate had not been produced, and therefore her age was not clear. He also testified that he was subjected to a medical examination during which his urine samples were taken, and he was found to be HIV positive. He however stated that the medical report was not supplied to him. He denied that he infected the complainant with HIV/AIDS and maintained that he was not examined for HIV/AIDS.

23 Regarding the allegations of incest, the appellant stated he left his home for Nairobi on the 9th March 2023 to visit his in-laws, and that he was accompanied by his second wife. According to him, they arrived in Nairobi on 10th March 2023 at around 6:00 a.m., and added that he remained there until 12th March 2023, when he travelled back home. He arrived on 13th March 2023 in the morning, at which point he was arrested by the chief. He asserted that he could not have committed the offence in the circumstances.

24 He called his second wife, IA Were, as DW1. She testified that on 9th March 2023 at around 8:00 p.m., she left for Nairobi with the accused to visit her sister; and that they returned to Homa Bay on the morning of 13th March 2023, when the accused was arrested. She confirmed that on 11th March 2023 they were in Nairobi and thus it could not have been possible for the appellant to defile the complainant as alleged. She added that they travelled to Nairobi in a private motor vehicle owned by one Jeremiah, which they had hired for Kshs. 5,000/=.

25 On cross-examination, DW1 conceded that the appellant is a preacher, but denied that he prays for people at his home. Her evidence was that the appellant ministers in a small structure in the village. DW1 further testified that she knew the complainant, and that she the child of her in-law. She also conceded that it was within her knowledge that the complainant had an illness, but denied that she was ever prayed for by her husband.

26 DW2 was JAO, a sister to DW1 and an in-law to the appellant. She testified that on 10th March 2023 the appellant and his wife arrived at her home along Thika Road in Nairobi at around 6:00 a.m. and stayed there until 12th March 2023, when they returned to Homa Bay. She stated that the following day she learned that the appellant had been arrested over an alleged offence of defilement. It was therefore

her evidence that the appellant could not have committed the offence because he was in Nairobi at the material time.

27 On cross-examination, DW2 stated that she did not know the accused's occupation and had never visited his home. She testified that the accused and DW1 arrived in Nairobi in a private motor vehicle, though she did not know who was driving it. She added that the accused and DW1 returned to Homa Bay in the same vehicle.

28 I have given due consideration to the evidence that was presented before the lower court in the light of the appellant's Grounds of Appeal. Broadly stated, the issue for determination herein is whether the appeal has merit, in terms of both conviction and sentence. That broad issue entails the questions as to whether the elements of the charge of incest were proved beyond reasonable doubt; the quality of the evidence presented before the lower court by the Prosecution and whether the appellant's defence of alibi was taken into consideration. The Court will also consider whether the life sentence imposed on the appellant by the lower court was warranted in the circumstances of the case.

29 It is noteworthy that, at paragraph 6 of his Petition of Appeal, the appellant impugned the decision of the learned magistrate on the ground that he failed to take into consideration the fact that despite the Prosecution claiming that he had the intention of infecting the minor with HIV/AIDS, no tests were conducted on him to determine whether or not he had HIV/AIDS virus. He pointed out that this omission was confirmed as a matter of fact by the Clinical Officer (PW3). He also contended that the learned magistrate failed to note that it was only the child who was tested and yet the charges preferred against him required tests on both the minor and the accused person.

30 I have no hesitation in rejecting this ground of appeal because the record confirms that the appellant was acquitted of Count II for the very reason given by the appellant herein. The court held:

> Turning to the second count, the evidence shows that Joseph was not examined for his HIV/AIDS status. Indeed, no such report was tendered. The allegation that he intentionally exposed the minor to HIV AIDS infection as charged in the second count is not therefore proved. The charge fails in the circumstances…"

31 That said, it is imperative to ascertain whether the key elements of the main charge of incest, which the appellant was convicted of, were proved beyond reasonable doubt. The said charge was laid under Section 20(1) of the *Sexual Offences Act*, which stipulates that:

> Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

32. The offence entails 4 different elements, namely, the age of the victim; penetration; the identity of the offender and lastly, the relationship between the offender and the victim. That proof of age of a

victim of defilement is imperative cannot be overemphasized. The Court of Appeal restated as much in Kaingu Kasomo v Republic Criminal Appeal No. 504 of 2010 thus:

> Age of the victim of 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".

33. At to what amounts to credible evidence, Rule 4 of the Sexual Offences Rules of Court Rules provides that:

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

34. It is also trite that, in addition to the documents set out in Rule 4 above, the age of a minor for purposes of the *Sexual Offences Act* can also be proved by the oral evidence of the minor's mother, by way of age assessment, as well as by observation and common sense. Hence, in P.M.M. v Republic 2018 eKLR, it was held thus:

> …whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant…"

35. The complainant testified before the lower court on 4th April 2023 and gave her age at the time as 16 years. Although no Certificate of Birth was exhibited, the investigating officer testified that she was presented to a dentist for purposes of age assessment. The report in that regard was produced before the lower court and marked the Prosecution's Exhibit 1. The report shows that the age of the complainant was assessed at between 15 and 16 years.

36. In the premises, it is my finding that credible evidence was presented before the lower court proving beyond reasonable doubt that the complainant herein was under the age of 18 years and therefore a child for the specific purposes of the proviso to Section 20(1) of the *Sexual Offences Act*.

37. The complainant identified the appellant as her uncle, the brother of her father. From the record, that assertion was not discredited but was in fact lent credence by the appellant's second wife (DW1), who said she knew the complainant as the daughter of her brother-in-law. Accordingly, the learned magistrate correctly found that there was sufficient proof that the minor is the appellant's niece. As was pointed out by the respondent, the incident occurred in the morning hours and in broad daylight. The complainant had consciously opted to go for prayers with the consent of her mother. She knew where she was going and who it was that was going to pray for her. She could not have been mistaken. Moreover, the complainant had no reason to make such a serious allegation against her uncle.

38. It is therefore my finding that the evidence of PW1 was credible enough to link the appellant and the crime. That evidence required no corroboration because the proviso to Section 124 is explicit that:

> …where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

39. Moreover, the Judgment of the lower court shows that the learned magistrate warned himself accordingly. At page 5 of the Judgment he made specific reference to the proviso aforementioned and satisfied himself that the complainant was truthful. Accordingly, not much turns on the contention by the appellant that he was convicted on the basis of uncorroborated evidence of a minor.

40. The evidence of penetration was also quite straightforward. The complainant stated what happened and mentioned that the appellant inserted his penis in her vagina. The evidence of penetration was corroborated by PW2, who noted that the girl had a freshly broken hymen and was bleeding from her genitalia. While the assertion by the appellant that the hymen can be broken by other means than penetration by a penis, the totality of the evidence points to the appellant as the person who caused the breakage by penile penetration.

41. Notably, the Clinical Officer (PW3), confirmed that she examined the victim soon after the incident had been reported and observed that her hymen was broken and fresh blood was seen in the vagina and numerous epithelial cells, a clear indication that the complainant had been defiled. The area Chief also testified that the matter was reported to him and that as he was going to the scene, he met the complainant in the company of members of the public. He was told that it was the appellant who had committed the crime and that he had to rescue him from an irate mob that had started beating him. There was therefore clear proof linking the appellant to the crime.

42. In her evidence the complainant mentioned Mama J, the appellant's wife, as well as her mother and grandmother as the three persons she reported her defilement to before the area Chief was contacted. None of them testified and the appellant took issue with this. He urged the Court to draw an adverse inference from this omission by the Prosecution.

43. Indeed, in the case of Bukenya & Others v Uganda 1972 EA 549, it was held that:

> The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

44. The principle was restated by the Court of Appeal in Sahali Omar v Republic 2017 eKLR thus:

    The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda (1972 E.A; where the court held that:

    i. "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

    ii. That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

45. The Court of Appeal also made it clear that:

> The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses,

but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

46. In this instance, none of the three uncalled witnesses, namely, Mama J, the complainant’s mother and grandmother witnessed the occurrence complained of. They were only informed of it by the complainant after the fact. In those circumstances, the Prosecution was entitled to make a decision as to whether to call them or not; as indeed, they are not obliged to call a superfluity of witnesses. Any alleged contradictions were also considered and resolved by the learned magistrate at page 5 of the Judgment. I therefore find no merit in the Grounds of Appeal that some witnesses were not called by the Prosecution or that the prosecution evidence was contradictory.

47. An important aspect of the appeal is the defence of alibi raised by the appellant before the lower court. He had contended that he left his home at 6.00 a.m. on 10th March 2023 and travelled to Nairobi with his second wife; and that he only returned home on 13th March 2023 in the morning when he was arrested by the Chief. He therefore posited that he could not have committed the offence. He called two witnesses to support this assertion, namely, his second wife, IA Were (DW1) and his sister in law, JAO (DW2).

48. An alibi is defined in Black’s Law Dictionary, Tenth Edition, to mean:

> A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time.”

49. It is trite law that the burden of proving the authenticity of the accused’s alibi rested with the Prosecution. Thus, in Kiarie v Republic 1984 eKLR, the Court of Appeal held:

> 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 is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable…”

50. Similarly, in Athuman Salim Athuman v Republic 2016 eKLR, the Court of Appeal held that:

> It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case…The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution…the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act…”

51. Nevertheless, it is vital for the defence of alibi to be raised at the earliest opportune time to enable the Prosecution investigate its legitimacy. The Court of Appeal of Eastern Africa in the case of R. v Sukha Singh s/o Wazir Singh & Others 1939 6 EACA 145 held:

> …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 is 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…"

52. And, in Victor Mwendwa Mulinge v Republic 2014 eKLR, the Court of Appeal rendered itself on the defence of alibi 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; see Karanja vs 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. It is imperative therefore that an alibi be raised at the earliest opportunity so that it can be tested during investigations, and to avoid the appearance of an afterthought. Once an alibi is raised, the prosecution must investigate and disprove it beyond reasonable doubt. The duty of the trial court is to weigh the alibi against the Prosecution's evidence, and if any doubt arises, such doubt must be resolved in favour of the accused.

54. In this case, there was no evidence that the appellant raised the alibi of being in Nairobi with the investigating officer or at the time of his arrest by the chief. The trial court considered the appellant's alibi and dismissed it as an afterthought, noting that he neither discredited the complainant's testimony nor suggested during cross-examination that he was in Nairobi. Having given the matter due consideration, I find no reason to fault that finding. Had the appellant been genuine, he would have raised his alibi at the first opportunity when he was arrested by PW4. He would have thereby given the Prosecution the opportunity to investigate the same as to its veracity or otherwise.

55. Lastly, I have given consideration to the sentence meted out on the appellant, bearing in mind the reiteration by the Court of Appeal in Bernard Kimani Gacheru v Republic 2002 eKLR, that:

> It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

56. It is instructive that, in the proviso to Section 20(1) of the *Sexual Offences Act*, it is stipulated that:

> ...if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

57. The Judiciary Sentencing Guidelines, 2023 at Paragraph 4.5 on Determination of the Sentence provide:

    4.5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders. (emphasis added)

58. It is therefore essential that at the sentencing hearing, care be taken by the trial courts to appraise culpability and harm based on the evidence or facts presented, taking into account any aggravating or mitigating circumstances. The Guidelines also require that the offender be allowed to mitigate, and that a consideration be given to all relevant reports before an appropriate sentence can be determined. In sexual offences, the court must also review the Section 39(4) reports before setting the custodial term and/or prescribing post-penal supervision.

59. In this matter, the sentencing hearing was held on the 23rd April 2024. The trial court considered a report by the probation officer dated 23rd April 2024 and took into account that the appellant was a first offender. Nevertheless, the appellant was not given a chance to present his mitigation. The appellant was consequently sentenced to life imprisonment for the offence of incest as laid in Count I without the benefit of mitigation. The court simply noted that it had considered the provisions of Section 20(1) of the *Sexual Offences Act*.

60. It is evident therefore that the trial court refrained from exercising its discretion on sentencing and proceeded on the basis that the proviso to Section 20(1) of the *Sexual Offences Act* entails a mandatory sentence of life imprisonment. That was an erroneous approach and the Court of Appeal has pronounced itself severally on the matter. For instance, in M K v Republic 2015 KECA 468 (KLR) the Court of Appeal held:

...18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:

"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".

We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".

20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that 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. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment..." (emphasis supplied)

61 It is therefore my considered finding that the sentence imposed on the appellant was premised on the wrong principle and therefore ought to be set aside.

62 In the result, while I find no merit in the appeal against conviction, the appeal on sentence is hereby allowed. The sentence of life imprisonment imposed on the appellant is hereby set aside. Having considered the proper interpretation of the proviso to Section 20(1) of the *Sexual Offences Act*, the complainant's age at the time of the offence, the relationship between the parties, the seriousness of the offence, the fact that the minor was suffering from mental impairment and the applicable sentencing principles, the appellant is hereby sentenced to imprisonment for 30 years.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 19TH DAY OF FEBRUARY 2026

....

OLGA SEWE

JUDGE