Lukeine v Republic (Criminal Appeal E005 of 2023)
[2026] KEHC 4995 (KLR) (16 April 2026) (Judgment)

Neutral citation: [2026] KEHC 4995 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E005 OF 2023

CW MEOLI, J

APRIL 16, 2026

BETWEEN

MELVIN LEYIAN LUKEINE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

(Being an appeal against conviction and sentence in CM's Loitokitok S.O. No. E001 of 2021 – Gatambia, PM)

JUDGMENT

1. Melvin Leyian Lukeine (hereafter the Appellant) was charged in the main count with Defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. In that on 12.02.2021 at Ilasit Location in Kajiado South Sub – County, within Kajiado County he intentionally and unlawfully caused his penis to penetrate the vagina of S.N, a child aged three and a half years. The alternative charge was Indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The Accused denied the charges.

2. Following a full trial, the Appellant was found guilty and convicted on the main count. He was thereafter sentenced to life imprisonment. Aggrieved by the outcome, he lodged the present appeal via his undated memorandum of appeal raising the following grounds of appeal:

    1. That the trial court erred in point of law by failing to observe that the prosecution's case was marred with inconsistencies and contradictions and hence did not prove their case beyond reasonable doubt against the defendant to warrant a convictional sentence.

    2. That the trial court erred in point of law by upholding conviction and sentence without observing that the entire prosecution case was impeachable under Section 163(1) of the *Evidence Act* thus unworthy to be relied upon.

3. That the trial court erred in law and facts by failing to give the appellant's defense adequate consideration as per the requirements under Section 169(1) of the criminal procedure code.

3. The Appeal was canvassed through written submissions. The Appellant by his submissions dated 17th March, 2025 contended that the learned trial magistrate failed to properly evaluate the evidence on record, particularly by overlooking material contradictions and inconsistencies in the prosecution's case, misapplying evidentiary principles, and failing to adequately consider the defence, thereby occasioning a miscarriage of justice.

4. He submitted on that account that the prosecution case was fundamentally impeachable under Section 163(1) of the *Evidence Act* due to glaring inconsistencies in witness testimonies. Highlighting inter alia that the complainant testifying as PW2 gave incomplete and incoherent testimony, allegedly due to communication challenges, which the trial court relied on alongside contradictory accounts from other witnesses. Significantly, he pointed out, PW2's statement indicated she could not identify the perpetrator of the offence due to darkness, while PW4 alleged that she referred to the assailant as "daddy". While PW1 stated that she did not know the culprit.

5. According to the Appellant, these contradictions, coupled with allegations of coaching of PW2 by PW1, were not reconciled, rendering the evidence unreliable. In that regard he cited Masia v Republic (Criminal Appeal E010 of 2024) [2024] KEHC 12659 (KLR) to the effect that where inconsistencies arise between a witness's prior statement and testimony in court, the burden is on the prosecution to reconcile the contradictions, failing which such evidence is deemed unreliable.

6. Further, the Appellant complained that the trial court failed to properly evaluate his alibi defence, contrary to Section 169(1) of the *Evidence Act*. Asserting further that the alibi was despite corroboration by DW2 improperly dismissed based on a misinterpretation of DW2's testimony as contradictory. He faulted the trial court for shifting the burden of proof onto him instead of requiring the prosecution to disprove the alibi beyond reasonable doubt. Here citing Kiarie v Republic [1984] KLR, and adding that where an alibi introduces a reasonable doubt, the trial court must give the accused the benefit of that doubt.

7. Additionally, the Appellant asserted that his constitutional right to a fair trial was violated due to lack of legal representation, contrary to Article 50(2)(h) of *the Constitution*. And that given the gravity of the charges facing him, and his inability to adequately defend himself, the State ought to have provided legal counsel, relying on the case of David Njoroge Macharia v Republic [2011] eKLR, in that regard.

8. In conclusion, the Appellant contended that the cumulative effect of the inconsistencies in the prosecution's case, the improper dismissal of his alibi defence, and violation of his right to legal representation was to render the conviction unsafe. He therefore urged the court to allow the appeal, quash the conviction, set aside the sentence, and grant appropriate relief including compensation for wrongful conviction.

9. In supplementary submissions dated 17th July, 2025, the Appellant revisited the issue of identification. Asserting that the prosecution case presented multiple conflicting descriptions of the perpetrator, ranging from an older man ("mzee wa porini"), a man on a motorbike identified as "daddy," to a younger man ("kijana") all which were later associated with the Appellant. This inconsistency, it is argued, creates a fundamental doubt as to whether the Appellant was ever identified at the time of the alleged offence. The submissions further emphasize that PW4 had the opportunity to identify the perpetrator during daytime but failed to provide any description until after the incident involving a mob, which suggests that her subsequent identification was retrospective and unreliable.

10. Concerning the said incident, the Appellant contended that PW4 identified the Appellant due to pressure from an angry crowd demanding that she name the culprit, as illustrated by her statement: ''Nikitaka kuongea, wamama wanaongea kwa ukali 'aseme aseme'". It is the Appellant's contention that this environment created a coercive atmosphere that likely led to a false accusation by the witness for self-preservation. And that eyewitness identification in such an environment was inherently unreliable and susceptible to suggestion.

11. Further, contending that PW4 and her family knew the Appellant beforehand due to a prior romantic relationship with a family member, he asserted that they harboured a negative disposition toward him. This prior hostility he claimed was a possible motive for falsely implicating him. Here highlighting what he termed as PW4's emotionally charged responses during cross-examination as indicative of her bias rather than objective testimony.

12. Concerning the available evidence, he asserted that no witness placed him at the scene of the crime, the complainant not having identified him, and that no medical or forensic evidence linking him to the offence was tendered at the trial. Moreover stating that uncorroborated evidence by a single identifying witness was unsafe and unreliable as held in several decisions, including Charles O. Maitanyi v Republic (1986) KLR, Kariuki Njiru & 7 others v Republic, and Abdalla bin Wendo v R (1953) 20 EACA 166.

13. Revisiting his complaint on the issue of coaching and fabrication, the Appellant submitted that the complainant ultimately did not give admissible testimony, as she was unable to testify coherently even through an intermediary, whereas the trial court relied on portions of her incomplete account. Thus, violated his right to cross-examination and fair trial.

14. Regarding the alibi defence, the Appellant reiterated that it was improperly dismissed despite not being investigated or controverted. In emphasizing that no prosecution witness placed him at the scene at the material time, he complained that no effort was made by investigators to verify or disprove the alibi. Citing Republic v Irungu & another (Criminal Case 51 of 2018) [2024] KEHC 1493 (KLR) (Crim) and Adedeji vs The State (1971)] 1 All N.L.R 75 for the principle that failure to investigate an alibi raises reasonable doubt.

15. Accusing the trial court of engaging in selective evaluation of evidence by cherry-picking portions that supported the prosecution while ignoring evidence that weakened its case, he contended that this amounted to failure to comply with the duty to give balanced and reasoned findings.

16. Finally, regarding the burden and standard of proof, reliance was placed on Woolmington v DPP (1935) A. C 462, Moses Nato Raphael v Republic (2015) eKLR, Bakare v State, and United States v Smith (1985) 2 NWLR. The submissions also addressed principles concerning circumstantial evidence, citing cases such as Ahamad Abolfathi Mohammed v Republic [2018] eKLR and Rex v Kipkering Arap Koske [1949] EACA 135, the Appellant contending that the prosecution failed to meet the strict threshold required in a case is based on circumstantial evidence.

17. The Respondent for their part filed submissions dated on 26th June, 2025 in opposing the appeal and supporting both the conviction and sentence. Taking the position that the prosecution proved its case beyond reasonable doubt, the Respondent addressed three key issues for determination: whether the prosecution proved its case beyond reasonable doubt, whether the sentence was harsh and excessive, and whether the accused's defence was duly considered.

18. Regarding the foremost issue, the Respondent submitted that the essential ingredients of the offence of defilement—namely age, penetration, and identification—were sufficiently established. On age, it was contended that the complainant was a minor aged 3 1⁄2 years, as confirmed by both her mother's testimony and an age assessment report. Reliance was placed on the holding in Alfayo Gombe Okello

vs. Republic Cr. App. No. 203 of 2009, by the Court of Appeal held inter alia that the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt 'because dire consequences flow from proof of the offence under Section 8(1)."

19. Concerning penetration, the Respondent asserted that the complainant's account was corroborated by medical evidence from a clinical officer, who confirmed injuries, including a broken hymen and bruises, as well as infection. The Respondent here echoing the statement by the Court of Appeal concerning the definition of penetration in Mohamed Bachero v Republic [2015] eKLR, that "the slightest penetration is sufficient to establish the offence of defilement."

20. On the identification of the perpetrator, the Respondent contended that the Appellant was positively identified by one M. (PW4) as the last person seen with the child. It was submitted that her testimony was credible and consistent, and that her recognition of the Appellant corroborated the victim's account. The Respondent further contended that the Appellant himself admitted being known to PW4, although he alleged bias, which the trial court rejected.

21. Supporting the sentence, the Respondent submitted that it was lawful and justified as pursuant to Section 8(2) of the *Sexual Offences Act*, defilement of a child under eleven years attracts a mandatory sentence of life imprisonment, and reiterated that the complainant in this case was only 3½ years old. Hence in the Respondent's view the sentence imposed was neither harsh nor excessive but rather appropriate and in accordance with the law, as has been consistently upheld by superior courts.

22. Refuting the Appellant's complaints regarding the trial itself, the Respondent submitted that the Appellant was accorded a fair opportunity to present his case. Including the opportunity to give oral submissions, recall witnesses, and even present documentary evidence. And that the trial court having considered his alibi defence found it unpersuasive in light of the prosecution evidence.

23. In conclusion, the Respondent submitted that the prosecution case was cogent, credible, and supported by both testimonial and medical evidence. And that the failure to recall the complainant or intermediary did not prejudice the case, as the evidence of PW4 and the medical findings sufficiently proved the offence. The Respondent therefore urged the court to find that the Appellant's conviction and sentence were proper, and that the appeal lacked merit and should be dismissed in its entirety.

Analysis and Determination

24. The court has considered the entire record of the lower court as well as the rival submissions on this appeal. On a first appeal, the duty of this court is to re-evaluate the evidence adduced before the trial court with a view to arriving at its own independent conclusions.

25. In that regard, the court is guided by the principles in Okeno -vs- Republic (1972) E.A 32:-

"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 finding 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 Peters Vs. Sunday Post (1958) EA. 424."

26. Three ingredients must be proved beyond reasonable doubt in case of defilement, namely, penetration, age of the victim and identity of the perpetrator.

27. The prosecution case in the lower court was based on the testimony of five witnesses. L.S (the victim's mother) testifying as PW1 stated that she was at the material time a casual labourer residing at Ilasit town with her daughter S.N (PW2) who was aged about three and a half years at the time, having been born on 9.09.2017. On 12.02.2021 at about 6.00pm, PW1 left her home for an errand as the minor

PW2 was playing nearby. Upon returning, however, she did not find PW2, prompting a frantic search that involved other neighbours.

28. In the course of the search lasting almost two hours, PW2 was found alone, wandering towards the border at about 8:30pm. She was distressed and dirty, had no shoes or underwear and was crying. Her clothes were wet and she had a semen-like discharge in her genitals. Taking her home, PW1 called the village elder. The child was examined and found to have been defiled. By that time, a crowd of people had gathered at that scene. Questioned, the minor said she was taken to ''porini" and an object causing pain was inserted in her. She also named a neighbourhood child, M.M (PW4) as the one who allegedly handed her over to a person she described as mzee, and when customs officers eventually arrived at the scene, they escorted the party to the Ilasit Police Station.

29. At the station, police questioned PW4 who gave a description of the man whom she said had taken the minor away earlier, and whom she said she could identify, having seen him in the area previously. And that he was at the scene when the officers first arrived at the scene next to her home. Escorted by two police officers back to the scene, PW4 pointed out the Appellant who sat among other persons and he was arrested.

30. Late in the night on the same date, PW2 was examined by Rhoda Chelagat (PW3) a clinical officer at Loitokitok sub-County Hospital. The witness testified that upon the examination of the minor, she observed bruising of the child's genital area (labia majora and labia minora) along with whitish discharge. She also noted that the child's hymen was missing. Laboratory tests, including urinalysis, revealed the presence of pus cells, indicating a bacterial infection, which resulted in the discharge. Her findings were recorded in the P3 form, which was completed on 16th February 2021 and produced as Exh 1, alongside lab results for the minor and Appellant (Exh. 3a and 3b) and the PRC form as Exh. 4.

31. During cross-examination, the officer clarified that there was a four-hour gap between the time of the incident and the child being brought to the hospital. Adding that the absence of bleeding did not rule out injury, she confirmed that the child had sustained bruises; and that both parties involved showed signs of infection.

32. As PW4 was the prosecution star witness, her testimony requires setting out in some detail. The witness was a 15 year old girl and gave sworn evidence after a voire dire examination consequent to which the court formed the view that ''Minor quite sharp and intelligent in giving answers ... is competent to ta ke oath and will give sworn testimony" .

33. PW4 recalled that on 12/2/2021 in the evening at around 6:00pm, she was playing with PW2 near their homes when the Appellant passed by on a motor cycle and stopped. He called out saying, ''Kuja Ka-mum,'' addressing PW2 by the minor's nickname, prompting the minor to run towards him. When PW4 asked the complainant who the man was, she stated that, "huyu ni daddy". The Appellant on his part also told PW4 that she had known the complainant's mother even before PW4 knew her.

34. PW4 further stated that the Appellant asked PW2 what she desired to which she replied that she wanted yoghurt, boarded his motorcycle and they left. But not before the witness asked PW2 whether she knew the Appellant and she replied that the Appellant had previously been her mother's visitor, while the Appellant told her to release PW2 as he would bring her back to her home.

35. PW4 when later accosted by PW1 who was looking for the daughter, related the incident to her and after the search was mounted PW2 was traced at 7:30pm and brought back home. Around that time, PW4 was further questioned apparently by a crowd gathered in the neighbourhood concerning the incident and perpetrator of the offence. Presently, customs police or customs officers came by and sought to know what the matter was. They intervened and escorted PW4 and PW1 and PW2 to the

police station, but by that time, the witness had seen the Appellant appear at the scene and sit among some young people gathered there.

36. At the Ilasit Police Station where PC Benson Thuo (PW5) also the case investigating officer, was at the report desk, PW4 on being interviewed revealed the above information concerning the Appellant. And gave a description of the Appellant as wearing red head phones on the neck, having braided hair and dressed in jeans and a red t-shirt, and that he was a familiar person in her neighbourhood although she did not know his name. She was escorted back to the scene by PW5 and two other police officers and identified the Appellant who was still there. He was arrested and taken to the police station where PW4 yet again confirmed that he was the person who had taken PW2 away. The witness stated that she was familiar with the Appellant having previously seen him "kwa launch(lounge) and kwa mtaa". PW4 was cross-examined at length on that date and on a subsequent date, after being recalled at the instance of the Appellant.

37. As for PW2, after two attempts, she was unable to proceed in her testimony beyond saying that she was taken to ''porini' by M. (PW4) to a mzee on a motor cycle who undressed her as she lay down and that she felt pain. Despite the appointment of an intermediary by the court, the witness could not complete her testimony and the prosecution eventually elected to forgo her evidence and to close its case.

38. Upon being placed on his defence, the Appellant elected to give a sworn statement and called one witness Jacob Meseyeike Lemui (DW2). Stating that he was both a musician and student at NITA College in Kitengela, the Appellant testified that on 12th February 2021 at around 5:00p.m., he was with his friend DW2 playing football at Ilasit until about 7:00p.m. Later preceding to Aisha's food kiosk where the two remained until around 9:00 p.m., when they escorted Aisha towards her home near Cape Town and then left.

39. While walking away, they were attracted by screams to a scene where they found PW4 being assaulted by a group of people demanding that she reveals where she had taken "the child" and he joined them in questioning PW4 who retorting by saying something to the effect that it was no wonder that ''Maggie did not love him'' and as he responded, customs officers came by and intervened, taking PW4 away to the Ilasit Police Station .

40. After ten minutes, the officers returned and on asking PW4 to confirm if he was ''the one'', they arrested him and escorted him to Ilasit Police Station where he met PW1 and PW2 as well as PW4's mother who said they did not know him, upon being asked. He claimed to have been framed by PW4 because her family was unhappy that he had a romantic relationship with one Maggie, PW4's sister and that the conspiracy was hatched by PW1, PW2, PW4 and her mother because they did not want him, a Maasai, to marry Maggie. He denied knowing or having any relationship with PW1 or residing near her home. The remainder of his testimony was essentially made up of submissions attacking the prosecution evidence.

41. DW2 for his part testified that he resided in Ilasit and earned a living by selling groundnuts at a kiosk owned by a woman named Aisha. He stated that the Appellant was his customer and a friend and recounted that on 12th February 2021, the two men had spent time together at a field where they were playing and exercising. Later, they went to Aisha's kiosk and stayed there having coffee until around 9:00p.m., which was after COVID-19 period curfew hours.

42. Afterward, they escorted Aisha home and thereafter came upon a scene where a lady was being asked apparently by interlocutors to ''sema'' or speak . Whereupon the said lady pointed and referred to him (Appellant) as Melvin. He expressed confusion about how the Appellant ''could have been involved in the alleged act, yet we had been together'' and stated that there was a likelihood of a conspiracy as the Appellant was ''a lover to the sister of the complainant''.

43. The core issue for determination is whether the prosecution proved the offence of defilement beyond reasonable doubt, specifically the elements of age, penetration, and identification of the perpetrator.

44. Concerning age, there was clear evidence that PW2 was a child aged 3½ years in the material period. According to PW1, the minor was born on 9th September, 2017, a fact corroborated by an age assessment report from Loitoktok Sub County Hospital dated 14th July, 2021. The issue was not contested at the hearing.

45. On the element of penetration, the medical evidence adduced by PW3 (the clinical officer) who had examined the minor confirmed injuries to the genitalia, including bruising of the labia and absence of the hymen, as well as infection and discharge. Equally, PW1 described the state of PW2 on being traced wandering on her own, without shoes or underwear and crying; she had semen-like wetness in her genitalia and seemingly had wet her clothes. She was in pain and traumatised, according to her mother, PW1. This evidence corroborates the occurrence of penetration, and whereas no bleeding may have occurred, under Section 2 of the *Sexual Offences Act*, even the slightest penetration is sufficient. Hence, the ingredient of penetration was adequately established by both medical and circumstantial evidence. See Mohamed Bachero v Republic [2015] eKLR.

46. The issue most disputed at the trial and on this appeal touches on the identity of the perpetrator. The complainant (PW2), due to her tender age and possibly trauma could neither describe in court who and what was done to cause her the pain she said she felt after being taken by mzee to ''porini' which is likely a bush given that her clothes had weeds, per PW3. While little weight could be given to the scant and untested evidence of PW2, it is clear that between 6:00pm when her mother left her playing and 7:30pm when found lost and wandering, she had been defiled.

47. Looking at the scattered sentences she uttered during her attempted testimony, all that could be deduced is that she had suffered grave trauma, and given her very tender age was unable to describe exactly what happened to her to cause her the pain she expressed to have felt. The younger a sexual victim is, the more likely the trauma and inability to describe her/his sexual molestation, more so in a court room which can be intimidating even for the accustomed adult.

48. No less than the Court of Appeal while commenting on the use of euphemisms by minor witnesses in describing sexual acts had this to say in Muganga Chilejo Saha v Republic [2017] eKLR:

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room."

49. The prosecution case largely rested on the testimony of PW4, who alleged that she witnessed the complainant being lured away and leaving with the Appellant on a motorcycle on the material evening. It appears from the testimony of PW4 that even before PW2 had been traced, PW1 had already approached PW4 and questioned her about the whereabouts of PW1 who was still missing, and was told that she had been taken by her supposed father. According to PW1, upon finding PW2, she named PW4 as the person who had released or handed her to a mzee. Indeed PW4 was further questioned by what appears to be a large group of residents. She eventually identified the Appellant as the culprit to the police.

50. The Appellant on this appeal as in the lower court, took issue with the various descriptions of the culprit as "mzee," "daddy," or ''kijana''. The first description (mzee) was attributed to PW2 by PW1 and was allegedly in the account PW2 gave after being traced on the material evening. The description of the Appellant as daddy was similarly attributed to PW2 by PW4 as she narrated her conversation

with PW2 as the Appellant persuaded the minor to go with him. Evidently, the Appellant was neither the daddy of the minor nor a mzee, and on all accounts the minor was too young to give a reliable description of the culprit who took her away and was in all likelihood too traumatised by the sexual assault to be coherent immediately thereafter.

51. However, it is important to note that from the evidence on record, it was not PW4 who gave the above descriptions to PW1 or police. PW4 did not at any point refer to the Appellant as a mzee or daddy herself, the descriptions were reportedly used by PW2 in the conversation between her and PW4 when PW4 tried to dissuade the minor from accompanying the Appellant. On her part, PW4 identified the Appellant by recognition and despite being cross-examined at length on two separate occasions upon being recalled, was not shaken. Hence, the so-called inconsistencies in describing the Appellant as mzee and daddy cannot be attributed to PW4, whose evidence affirmed having previously been familiar with the Appellant from seeing him in her neighbourhood, and related in detail her conversation with him at the point when he lured the minor to go with him.

52. PW4 not only described the Appellant's attire and the red headphones worn by the Appellant, but also narrated in elaborate detail her attempts to dissuade the minor from accompanying the Appellant who at one point even claimed to have known the minor's mother, which PW1 confirmed. The Appellant further went ahead to ask PW4 what she desired, and she replied ''yoghurt". This incident happened at dusk and in the court's view, PW4 having held a relatively long conversation with the Appellant and PW2 before the two left, had the opportunity to observe the Appellant clearly. More so, because he was not a stranger as PW4 said she had seen him previously in the neighbourhood.

53. Later on the material date, while PW4 was admittedly being questioned rather aggressively by neighbours, customs officers who came by intervened and took her away to the police station. There, she told the police that the culprit had actually been left at the scene and she gave a description of him and his attire, before police who accompanied her there arrested the Appellant once she identified him. She said that the Appellant was still wearing the same clothes. The trial court which had the opportunity to see the witness testify was impressed by the testimony of PW4 as the notes on the record clearly indicate. The court believed her version of events as the judgment reveals, and indeed a good explanation would be required for the witness picking on and falsely implicating the Appellant out of all the people gathered at the scene.

54. While indeed on the material evening there was a flurry of incidents whose sequence was at times not so clear, there can be no doubt that there were at least three separate incidents on the material evening. The first being at 6:00pm when according to PW4 the Appellant lured PW2 away as the two children were playing near their homes. Two subsequent incidents occurred at the same scene where the Appellant's arrest took place, which is distinct from the scene of the first incident.

55. Describing the second incident when PW4 was being questioned to name the culprit, she said "Nikitaka kuongea wa mamama wanongea kwa ukali ''aseme aseme" as they accused her of complicity in the disappearance of PW1 . PW4 stated that the Appellant had by that time arrived at that scene and sat among some young men, which the Appellant seemed to confirm in testifying that he had also joined the assembled group in demanding that PW4 reveal the truth. And that the PW4 retorted that it was no wonder he was not loved by Maggie. However, this alleged altercation was never put to PW4 during cross-examination.

56. It appears that this second incident was interrupted by customs officers who came by and intervened, taking PW4, PW1 and PW2 with them to Ilasit Police Station where she was interviewed and gave a full description of the Appellant, and explaining that although she did not know his name, she was familiar with his appearance having previously seen him in the neighbourhood.

57. The third incident according to PW4 was when she returned to the same scene of the second incident with police and identified the Appellant who was arrested at the scene, which the Appellant did admit saying that the witness had before that been taken away by the customs officers to the police station. Indeed, according to PW5, he and two other officers from the station accompanied PW4 to the scene of arrest. PW4 said she saw him and was able to identify him in the light of torches before arrest, and later in the light on their arrival at the police station. In light of this evidence, it is hard to believe, as the Appellant asserted in his submissions, that PW4 named him to save herself from the interlocutors gathered at the scene.

58. First, PW4 herself admitted that the women interrogating her in the second incident were aggressive and she had no opportunity to answer them as they pressed her to reveal information on the child. This was a 15 year old girl faced with a hostile and agitated group of neighbours, and whose entire evening was full of unprecedented events. It is quite likely that she could barely express herself, and contrary to the assertions by the Appellant, the witness was due to the pressure, unable to speak at the second incident. The sequence of events per PW4 and as confirmed by PW5 indicates that the former only gave information concerning the Appellant when she was escorted to the police station by customs officers, and stated to the police that in fact the culprit had been left at the scene of the second incident.

59. The submission by the Appellant that the identification of the Appellant by PW4 was unreliable being information obtained by a mob under duress, or that there were inconsistencies in the identification evidence hold no water in the circumstances. In any event, not every contradiction or inconsistency is fatal to the prosecution case. This is what the Court of Appeal said concerning alleged contradictions and inconsistencies in the prosecution evidence in Thoya Kitsao v Republic [2015] KECA 174 (KLR)

''But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not ipso facto prove that the evidence is false or unreliable (See WILLIS OCHIENG ODERO V. REPUBLIC, CR. APP. NO. 80 OF 2004 (KISUMU)). Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.

In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR APP NO 92 OF 2007, the Court of Appeal of Tanzania stated as follows regarding discrepancies in evidence, which we respectfully endorse:

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

60. Similarly, on this appeal, the court finds that any contradictions and inconsistencies concerning identification, including those cited by the Appellant are not fundamental, and cannot vitiate the judgment of the trial court. They were minor and did not go to the root of the prosecution case. The trial court carefully examined the evidence of PW4, a sole eyewitness of an incident occurring at dusk. In Joseph Muchangi Nyaga & Anor v R [2013] eKLR the Court of Appeal stated:

> " Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege v R [1979] KLR 271). Greater care should be exercised where the conditions for a favorable identification are poor. (Gikonyo Karume & Another v R [1980] KLR 23). Before a court can return a conviction based on identification of any accused

person at night and in difficult circumstances, such evidence must be water tight. (see Abdalla Bin Wendo & Another v R (1953) 20 EACA 166; Wamunga v R [1989] KLR 42; and Maitanyi v R [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him..."

61. In the court's view, the trial court properly accepted PW4's identification evidence as guided by dicta in the case of Anjononi & Another vs. R [1976-80] KLR 1566, to the effect that:-

> " The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stolen property is found in the possession of the accused.....
>
> Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

62. Indeed, the defence of a frame-up advanced by the Appellant, was itself an indirect admission of familiarity with PW4. As regards the assertions in his defence that PW4, a mere 15 year old was involved in a conspiracy to falsely accuse the Appellant because he had a romantic relationship with PW4's sister (Maggie) which the family disapproved of, this was raised for the first time during the defence. Despite cross-examining PW4 at length when she first testified and on being recalled, the Appellant did not canvass that issue directly with the witness, only asking whether she knew a person called Maggie, which PW4 denied. In any event, the mother of the victim minor, PW1, being a stranger to the Appellant, would have had nothing to do with the alleged conspiracy and no such issue was put to her during cross-examination.

63. Finally, the Appellant has complained that his alibi defence was not given its proper weight by the trial court. In Mwangirani vs Republic (2024) KECA 209(KLR), the Court of Appeal stated the following:

''The consistency with which this Court has dealt with the issue was emphasised in Wang'ombe v The Republic [1980] KLR 149, where this Court (Madan, Miller and Potter, JJA) held that:

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

64. The Court further stated that:

''We associate ourselves with the decision of the Supreme Court of Uganda, in Festo Androa Asenua vs. Uganda, Cr. App No. 1 of 1998 when it observed that:

> " We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.

Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed, in Ganzi & 2 Others vs. Republic [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence..."

65. In concluding the Court of Appeal expressed itself as follows:

''In Wang'ombe v The Republic (supra), the Court found that:

" The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it...In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act, 1967, Section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under Section 11(8) 'the prescribed period' means the period of seven days from the end of the proceedings before the examining justices. Section 11(1) applies where the defendant alone is to testify that he was elsewhere at the material time; see R vs. Jackson and Robertson [1973] Crim. LR 356... The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant!"

66. The Appellant's alibi defence was not canvassed with key prosecution witnesses, namely PW4 and PW5 during cross-examination. Nor was there any indication that this issue was mentioned to police by the Appellant on his arrest. It would appear that the said defence was sprang up for the first time during the Appellant's evidence, in what seems to be an afterthought. The complaint that the alibi defence was not investigated appears unjustified in the circumstances.

67. The trial court, as seen in its judgment, weighed the Appellant's alibi defence against the prosecution evidence on the basis of the principles stated in Kiarie vs Republic (1984) eKLR before concluding, correctly in my view, that the said alibi defence was completely displaced by the prosecution case. In this case, there was an eye witness, PW4, who was emphatic that she knew the Appellant and recognized him in favourable circumstances as he took PW2 away. In the end, the prosecution evidence dislodged the Appellant's defence of alibi and placed him at the scene of the first incident. In the court's view, the Appellant's defence of alibi raised no doubts as to the presence and action of the Appellant in luring the minor victim away.

68. In that regard, the court draws guidance from the sentiments of the Court of Appeal in Victor Mwendwa Mulinge vs R, [2014] eKLR;

> " 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 v. R, [1983] KLR 501 ... 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 guilt 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 investigation and thereby prevent any suggestion that the defence was an afterthought."

69. About two hours after the victim herein was lured away by the Appellant, PW1 found her wandering around on her own, distraught and having been defiled. Having taken the minor away on the fateful evening, what happened to her thereafter is a matter strictly within the knowledge of the Appellant, pursuant to the provisions of Section 111 of the *Evidence Act*. Only he could explain what happened to the minor, and in the court's view, his subsequent appearance at the second incident was probably intended as a smokescreen to his actions, possibly in the mistaken belief that nobody could have recognised or identified him at the scene of the first incident.

70. As the trial court correctly found, the circumstances of the case come within the principles in the case of Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990 (UR). As well as Kipkering Arap Koskei & Anor V R (1949) 16 EACA 135 where it was held :

> " In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always in the prosecution and never shifts to the accused."

71. And further in Simoni Musoke v R (1958) EA 715 it was held that:

> " In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

72. Citing the decision of the Privy Council in Teper v R [1952] 2 ALL E.R. 447; [1952] A.C. 480 the court stated in Musoke:

> " It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

See also Ahamad Abolfathi Mohammed v Republic (supra)

73. The court is persuaded that the prosecution evidence, though circumstantial, satisfied the tests outlined in the authorities above, and that the Appellant's defence was completely displaced and properly rejected by the trial court. The conviction was based on solid and cogent evidence.

74. Before concluding, the court has also noted the Appellant's complaint that he was not accorded a fair trial due to want of legal representation during the trial. A perusal of the record of the trial before the

lower court does not support such a claim. It is true that the Appellant was charged with a serious offence and was not represented by counsel. However, from the proceedings of the trial, the Appellant understood the nature of the charges facing him and put forth a robust defence by cross-examining the prosecution witnesses, recalling some for further cross-examination, and making elaborate submissions as he has done on this appeal, before eventually electing to give his sworn defence statement and calling his own witness. At no point during the trial did the Appellant raise any complaint concerning representation or cite any difficulty in mounting his defence. Nothing therefore turns on the complaint relating to non-representation by legal counsel.

75. In the result, this court, having considered the appeal found no justification to disturb the findings by the trial court. The appeal is without merit and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 16TH DAY OF APRIL 2026.

C. MEOLI

JUDGE

In the presence of:

For the State: Ms. Kambaga

For the Appellant: Mr. Kahia

Appellant: Present

C/A: Lepatei

JUDGMENT HCCRA NO. E005 OF 2023 1 | Page