Omanga v Republic (Criminal Appeal E103 of 2025)
[2026] KEHC 6230 (KLR) (11 May 2026) (Judgment)

Neutral citation: [2026] KEHC 6230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E103 OF 2025

DKN MAGARE, J

MAY 11, 2026

BETWEEN

PETER YOUNGREEN OMANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. J Irura, SPM, in Kigumo criminal case number E008 OF 2025.

2. The Appellant was charged with defilement contrary to Section 8(1) & (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the Appellant, on 08.09.2025 at around 1900 hours at [particulars withheld] Village, Kangari Location In Kigumo Subcounty within Muranga County intentionally caused his penis to penetrate the vagina of J.O, a child aged 17 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 the Appellant, on 08.09.2025 at around 1900 hours at [particulars withheld] Village, Kangari Location In Kigumo Subcounty within Muranga County intentionally and unlawfully touched the vagina of J.O, a child aged 17 years with penis.

4. The Appellant was arraigned in court on 11.06.202,5 before Hon. J Irura, SPM. Plea was taken and the matter referred to court 6 for trial. The appellant was granted a bond of Ksh. 200,000/= with alternative cash bail of Ksh 100,000/=.

5. PW1, was the minor who testified that she was born on 2.08.2008. She lived with her mother who are younger than her. She stated she was in court because she went to the appellant's house, whom she called peter. She stated that she was with another woman when she was going on leave. She left the other woman at home. She left her home and went to meet Daniel. Daniel's mother is a friend to her mother.

6. Daniel told her to meet the appellant. She stated that Daniel left leaving her with peter who then asked her to have sex. She then had sex with the appellant and did not use any protection. The appellant took the complainant home and got through the window. In the morning when her mother asked her where she was but she LIED that she was under the bed and she closed the door and moved to bed.

7. Later a headteacher called and asked where she was. He told the teacher that she was at peter's house. She was taken to the police station hospital and later examined at Kigumo hospital. She was first placed in the cells and removed when and found that peter was at the police station.

8. On cross examination she stated that it was Sunday. She stated that she knew Daniel who is a friend to her mother. He stated that the appellant did not promise her anything.

9. PW2 was PW1's mother who testified that on Sunday in June; the date and year are not indicated. She left the complainant at home and went to work. Came back at 5Pm and did not find her. She waited until 11.00pm and went to sleep. She enquired from her neighbours, including Isaak, if they had seen but they had not. She did not talk to her. She told the complainant to go to school but called the teacher and told her that the complainant did not sleep at home. After she left the witness followed her to school and spoke with the head teacher., who is also her employer. They called the complainant who came and told her that she was inside the house. The head teacher informed them that since the matter had been reported, they were to go to the police station. The matter minor was taken to the police station where she was interrogated by Lilian and she said she was at peter's house.

10. The minor was taken to hospital where she was examined and found to have been defiled. She stated that before the incident she had warned peter of interfering with the daughter as she received information that she was sending them to the daughter JAO. She stated that the appellant was arrested at home. He was identified by Isaak. He stated that he gave the original birth certificate to the investigating officer.

11. On cross examination, she stated that the complainant used to disappear every Sunday. She followed the complainant and she said that she was going to the appellant's house. She asked the complainant what the money was and she told her that that the appellant had borrowed money to buy sugar. The appellant was watching TV with John and told them to close the gate but they refused. After this the complainant slept with the minor and escorted her home. When she removed a stone to gain access the house. The witness did not call the appellant's boss when the complaint disappeared. It is this kind of evidence that PW2 has tendered in cross examination that, reminds me of the lamentations by Odunga J, as he then was, in Kioko Peter v Kisakwa Ndolo Kingóku [2019] KEHC 11387 (KLR):

....Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N v N [1991] KLR 685 he expressed himself in the following terms:

> " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

12. In the South African case of Matatiele Municipality & Others v President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that

> " in my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa..."

13. On re-examination she stated that she did not know where the complainant was at night.

14. PW3 Isaak Chundukai Martin stated that he recalled being told that the complainant was at a fence near the appellant's house. He was told by the complainant's brother. They told the brother, to sit since the complainant usually returned home around, 2000 hours to 2300 hours. They waited and but the "daughter" did not come. Their houses were next to each other. In the morning, she heard the house vibrate as the complaint was removing a stone to gain access.

15. On cross examination, he stated that the got information that the complainant was in the appellant's house but did not tell the mother. On re-examination, he stated that they had come back from work when they got information that the complainant was in the appellant's house. The mother stated that they wait as she always comes back.

16. The mother that she was inside the house. The minor reportedly told the mother that she slept under the bed. He told them other to allow the complainant to go to school.

17. PW4 was Laura Midevaresha, a clinical officer, working at Kigumo subcounty hospital. she had the complainant's P3 for a patient who was treated at Kangari health centre. she used the information of rom the PRC to fill the P3. The victim had reported at Kangari health centre that she went missing and spent a night at a man's house and had vaginal intercourse and left in the morning. it was reported that it as not the first encounter as she used to visit him at night and leave in the morning.

18. She stated that the hymen was broken, whitish discharge in the labia minora. There was presence of pus, epithelial cells but no yeast.

19. She stated on cross examination that the complainant had a urinary tract infection, no sperms, hymen was broken but not indicated whether freshly or old. the report did not indicate any presence of sperms.

20. PW5 was PC(W) Lilian Mugo of Kangari police station. on 09.06.2025 at noon she was assigned this case to investigate. The minor and two teachers from the complainant's school went to the police station. They escorted the complainant to hospital as instructed by the OCS. She recorded her statement and those of witnesses she had disappeared from home and went to a person who lives in the neghbourhood and spent the night there. She decided to go home before dawn, removed a stone and passed through a whole to her house and slept.

21. When the mother went to wake up siblings, she was inside the house. The mother explained that reports had indicated that the appellant had been seen with the complainant. The report was allegedly from villagers. The appellant appeared anxious, was counselled, and went back oy the station. The accused was arrested from the home where he was working. The birth certificate was sent to her but it was not clear. The complainant was born on 11.08.2009. The complainant physically identified the appellant as the person he was visiting but did not know the second name.

22. The court found that the appellant had a case to answer. The appellant was placed on his defence and section 211 of the criminal procedure code was complied with.

23. The appellant gave sworn evidence he said he was Peter Younggreen Omanga Esther. On 08.06.2025 he came from church at 1600 hours and did evening chores. He headed to Kangari for some shopping. On the way he met the complainant with one Dan, greeted then and proceeded to Kangari. On 09.06.2025 he was continuing with his chores when he heard a knock on the door when he opened door, he found officers with Dan, whom he had seen the previous evening with the officers. he enquired what the trouble was and on being informed that he was to be informed later, he locked the house and the gate and left with the officers. he did not ask questions but gave them only his name. he denied any relationship with the complainant.

24. On cross examination, he stated that he met the complainant and Dan on the road. He greeted them and parted ways. It was not true that the complainant slept in his house. The appellant lived alone in the homestead. The complainant's mother never warned her. She had no grudge with the mother. The complainant had no reason to lie that he defiled her. The last question is tautological as the appellant cannot know the reason for an action by another party.

Impugned Judgment

25. The court found the appellant guilty and sentenced him to 15 years imprisonment. the court, instead of analysing the evidence, proceeded to treat the complainant's evidence as confirmatory. for example, the court indicated... "on cross examination she confirmed..." such a finding is thus affected by confirmatory bias. in the case of Mwati v Republic [2025] KEHC 15324 (KLR), court noted as follows:

    The fact that PW3, led the police to a classmate, and game then the name of the assailant led to what we call in statistics, confirmatory bias. This is a human tendency to seek, interpret, favor, and remember information that supports or confirms one's existing beliefs.

26. The court found that the appellant's evidence was an afterthought. I do not know when the burden of proof was ever shifted to the appellant. The court alluded to the define but did not analyse the same. Had the court analyzed the same results would have been different.

Submissions

27. The Appellant filed submissions dated 2.2.2026. It was submitted that the court convicted the Appellant on inconsistencies and contradictions.

28. The Appellant also submitted that penetration was not proved and identification evident was weak with possibility of errors.

29. It was further submitted that the court failed to consider the defence by the Appellant.

30. Further, it was submitted that the legal representation right of the Appellant were informed. He cited Article 50(20 (g) of *the Constitution* and Chacha v Republic (2016)e KLR.

31. On sentence, he submitted that the sentence was harsh and excessive and should be interfered.

32. The Respondent filed submissions dated 28.1.2026. It was submitted that the case against the Appellant was proved beyond reasonable doubt. Reliance was placed inter alia on Hilary Nyongesa v Republic Eldoret HCRCA No. 123 of 2009.

33. It was also submitted for the Respondent that there were no grave contradictions and inconsistencies as to go to the substance of the charge. Reliance was placed on Twehangane Alfred v Uganda.

34. On sentence, it was submitted that theb sentence of 15byears was lawful under section 8(4) of the *Sexual Offences Act*. Reliance was also placed on Republic v Mwangi & 4 Others (2024) KESC 34.

Analysis

35. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 held 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."

36. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of Okeno v Republic [Supra], the East Africa Court of Appeal stated on the duty of the court on a first appeal:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

37. 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.

38. Brennan addressed the standard of proof required in such cases, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at page 36164 that:

The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

39. 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 v 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."

40. 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. 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.

41. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

42. Courts dealing with criminal matters must always remain mindful of the high standard of proof required and the serious consequences that a conviction imposes on an accused. The standard of proof beyond reasonable doubt applies, particularly given the nature of criminal offences, whose consequences extend beyond the individual to society at large. A conviction and sentence as a sexual offender carries a lifelong stigma and can only be justified based on indisputable evidence.

The Law

43. The law under which the appellant was charged is provided under Section 8 of the *Sexual Offences Act* as hereunder:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

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.

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.

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.

44. The essential constituting defilement were set out in the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013, as the age of the complainant, proof of penetration, and positive identification of the assailant. These key ingredients of the offence of defilement, were similarly elucidated in the case of George Opondo Olunga v Republic [2016] eKLR are;

a. Proof of the age of the complainant,

b. Proof of penetration and

c. Proof that the appellant was the perpetrator of the offence.

d. and {I must add that the penetration is of a sexual organ, [of the vagina or anus] by a sexual organ}.

45. The first element, age, is a bit relaxed, especially for children of tender years. It can be proved, though, by a birth certificate, baptism card, or by oral evidence of the child if the child is sufficiently intelligent, or by the evidence of the parents or guardian, or medical evidence, among other credible forms of proof. The key element in proof of age is credibility. In more grown-up children, the difference between young adults and children is razor sharp. The court must be vigilant to prevent adults masquerading as children. The Court of Appeal in Edwin Nyambogo Onsongo v 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.

46. While addressing the question of age of the victims in the Sexual Offenses Act, the court in Kaingu Elias Kasomo v 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."

47. The age of the minor is relevant to the extent that it is to make a distinction between those aged 18 and under 18. If, for any reason, it is proved that a person is a child under the age of 18, but there is a difference in respect of whether the child is 7 or 8, then such a difference is irrelevant. Where the age flows into the next age for purposes of the offence, an acquittal cannot follow. The offence of defilement is complete upon proof that a person is under the age of 18. The actual age is required only when the court is considering, for purposes of sections 8(2), 8(3), and 8(4). The Court of Appeal in the case of Stephen Nguli Mulili v Republic [2014] KECA 408 (KLR), addressed this aspect as follows:

In the case of Kaingu Elias Kasomo V R, Malindi CR. NO. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

48. However, as the Court clarified in Tumaini Maasai Mwanya V R, MSA CR.A. NO. 364 OF 2010, proof of age for the purpose of establishing the offence of defilement, which is committed when the victim is under the age of 18 years, should not be confused with proof of age for the purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. It is only when there is evidence of doubtful origin that a doctor can determine the age scientifically. In the case of Francis Omuroni v Uganda Court of Appeal No. 2/2000, the court held that:

In defilement cases, medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from Medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.

49. Of all the three elements, the one element that is missing is the perpetrator. The defence and prosecution case were congruent on one aspect. The complainant was seen with one dan. The appellant cross examined on the said dan this is the same person who went with the officers to arrest the appellant. He is one person who would have removed the façade over the case. He is a crucial witness who was not called. before I address the question Dan, indeed to deal with the provisions of section 124 of the *Evidence Act*, which provides as follows:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided 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.

50. Once elements that are supposed to obtain in section 124 obtain, the court is supposed to rely on the evidence f the minor. Unfortunately, the minor herein was not truthful. She herself stated that the lied to the mother. The mother lied that he saw the complainant in the appellant's house. On reexamination she stated that she did not know where the complainant was. The mother stated that the complainant did not tell her anything while PW4 stated that she heard the complainant telling the mother. The

complainant maintained that she was at home when questioned by the mother, then she maintained the same when questioned by the headteacher. It is only after arrest that the name peter came in.

51. Her evidence was totally inconsistent. She alleged to have met the complainant though Daniel the very night. However, the mother's view was that she was sneaking out every Sunday. The mother alleged to have warned the appellant earlier. The appellant was not aware of the warning. It is possible that there was a case of mistaken identity. the complainant did not identify the person to be arrested. is it possible that she moved along with the mother's story?

52. It does not make sense to have the mother warn someone, prior to meeting, for a person the complaint maintains were introduced to each other by Daniel. How could the mother know in advance and warn, when they had not met. The issue of section 124 of the *evidence Act* was discussed in the case of Geoffrey Kionji v Republic Cr. Appeal No 270 of 2010, where it was held as thus:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.
>
> As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded."

53. The court was pliantly wrong in punishing the appellant for living in the same village as the complainant. The court failed to have the evidence trail. The chain of custody of the complainant was lost when the evidence was tendered that as at 6pm, the complainant was with Dan. He was a son to the mother's friend. Why was he not called?

54. The other gaping hole relates to the sex. The complainant's mother testified that he was aware of the sex and some exchange of money. She also stated that the complainant was to come back as she usually came back between 8-11 pm. The compliant allege to have been brough back by the appellant, at 10.00 PM. This could not be true since she was heard entering the house at dawn. Where was she? The discrepancies could have been cleared by the evidence of Daniel. What time did they part. After admitting to be lying, the complainant threw section 124 of the *evidence Act* through the window.

55. The court will make a negative inference, that had Daniel testified, his evidence would have been adverse to the prosecution case. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows: -

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

56. However, I am equally persuaded by the reasoning of Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR where the learned judge stated as follows:

> " 53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while

> Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded."

57. Had Daniel testified the evidence could have been adverse to the state case. The gaps and contradictions were humongous, as huge as Menengai crater. Consequently, it was the primary duty of the trial court, which it failed, to carefully analyze the contradictory evidence and determine which version of evidence, on the basis of judicial reason, it could prefer. In Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal held that:

> " The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO v REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

58. Did the mother follow the complainant to the appellant's house or she did not. The trial court failed to hold that such a magnitude of contractions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. As was noted in Twehangane Alfred v Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

59. Regarding penetration, the medical reports are inconclusive as to whether there was penetration. The was nothing of significance noted, it was not clear whether the hymen was freshly broken or old.

60. The extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another v Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

61. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

62. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them as stated in Parvin Singh Dhalay v Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo v George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -
>
> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

63. It is thus unnecessary to go into the question of age of the complaint in the circumstances of the case. I am unable to agree with the trial court that the prosecution proved the offence beyond a reasonable doubt. There was indeed no evidence of penetration or that the appellant was the perpetrator. In totality, the Respondent herein did not prove the offence of defilement against the Appellant beyond reasonable doubt, and the trial court erred in convicting the Appellant. Consequently, the appeal is allowed. The conviction is set aside.

64. The sentence is a slave of conviction. In absence of conviction, the question of sentence becomes moot.

Determination

65. In the circumstances, I make the following orders:

    a. The appeal on conviction and sentence is allowed. The conviction and sentence are set aside. The appellant is set free unless otherwise lawfully held.

    b. The appellant's name be removed from the register of sexual offenders.

c. Right of appeal 14 days.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF MAY, 2026.

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Mr. Kihara for the ODPP

Pius Kimathi

Court Assistant – Martin

M. D. KIZITO, J.