Atsenga & another v Republic (Criminal Appeal 63 & 64 of 2019 (Consolidated)) [2025] KEHC 9748 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 63 & 64 OF 2019 (CONSOLIDATED)

PJO OTIENO, J

JUNE 26, 2025

BETWEEN

RODGERS ATSENGA ..... 1ST APPELLANT

FRANKLINE IKOMERO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. H. Wandere (SPM) in Kakamega CMCC SO case No. 29 of 2017)

JUDGMENT

1. The 1st and 2nd Appellant were jointly arraigned before the Senior Principal Magistrate at Kakamega in Sexual Offences Case No. 29 of 2017 charged with two counts.

2. In the first count, the two were charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the *Penal Code*. The particulars of the offence were that on the 1st day of May, 2017 at [Particulars withheld] village, [Particulars withheld] Sub Location [Particulars withheld]Location in Kakamega East District within Kakamega County, the Appellants and others jointly entered the dwelling house of RM and stole one bag of maize, three hens and Kshs. 915 in cash, all valued at Kshs. 7,115 the property of the said RM.

3. The second count preferred the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 1st day of May, 2017 at [Particulars withheld] village, [Particulars withheld] sub location [Particulars withheld] Location in Kakamega East District within Kakamega County, the Appellants in association intentionally and unlawfully caused their penis to penetrate the vagina of VM a child aged 15 years old.

4. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 1st day of May, 2017 at [Particulars withheld] Village, [Particulars withheld] Sub Location [Particulars withheld] Location in Kakamega East District within Kakamega County, the Appellants in association intentionally and unlawfully caused their penis to come into contact with the vagina of VM a child aged 15 years old.

5. The Appellants pleaded not guilty to the charges and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses while the defence side called two other witnesses to buttress the evidence by the two Appellants.

6. PW1 was a minor aged 15 years. The court chose to administered Voire dire examination on her. The court was satisfied on her understanding of the nature of an oath and directed that she gives sworn evidence. Her evidence was that after her parents separated, she moved to Nairobi to stay with her father and got pregnant and was taken to live with her grandmother in Shiatsala Village.

7. On 1/5/2017 while the witness was in the house sleeping, five men broke into their house. The men asked for a jembe saying they were police officers. Two men then got into her room, and the 2nd Appellant entered her bed, pulled down her pants and has sex with her. After he was done the 1st Appellant also had sex with her. She stated that she knew the 1st Appellant since he used to stay with one aunty Jane who was their neighbour and that she also knew the 2nd Appellant though she did not know where he stayed. She stated that the 2nd Appellant then got a panga that was in her room and cut the maize sack that was hanged in the room. They then ransacked her purse and took Kshs. 915/- which was proceeds from selling milk. They also made away with three chickens that were in the sitting room. She claimed that she was able to see the Appellants well since they lit torch lights and they spoke to her and her grandmother all along. She further claimed that she had never quarreled with the Appellants.

8. On cross-examination by the 1st Appellant she stated that it was her Uncle who reported the incident to the police. She stated that she did not raise an alarm during the incident since the first Accused, not a party in this appeal, had threatened to kill her if she did so. She further stated that she was pregnant with the 1st Appellant before the incident and that the 1st Appellant called a midwife who interfered with her pregnancy prompting her to undergo a caesarian section. She then moved in with the 1st Appellant and later left his home after which the subject incident took place. She denied claims that her grandmother asked for dowry from the 1st Appellant and that she reported him because he married another woman.

9. On cross examination by the 2nd Appellant she stated that she identified him in an identification parade and that his brothers had indicated that he had come home with maize they suspected to be stolen. On re-examination she stated that none of the stolen items was recovered.

10. PW2, who is the victim's grandmother testified that on the night of 30/4/2017 and 1/5/2017 at about 3 a.m., she was in the house, in her bed, when she felt the door drop. She got up and saw figures in the sitting room. One was in her room and the others followed and they lit their torch lights. The 1st Accused then stood on her bed with a panga asking for alcohol. The 1st Appellant then kept on looking at his room armed with a panga and asking for alcohol and the 3rd Accused asked how many people were in the house. They asked where PW1 sleeps and the 2nd Appellant opened her door and she heard a commotion in her room and then he switched off his torch though the 1st Accused was still on her bed holding a panga over her. The 2nd Appellant then left PW1's room and the 1st Appellant went in. The 2nd Appellant then asked for a panga and went back to PW1's room where he cut a hanged bag of maize, re-packaged the maize into more bags. The gang then carried and left with the maize bags together with three chickens and cash in the sum of Kshs. 915/-.

11. After the gang left PW1 went to the witness' room and told her that two men had raped her and she was in pain. She went to a neighbor's home where she started wailing and a crowd gathered and PW1 was taken to hospital. While in the house, the 1st Accused came to console with the family and she identified him and he helped the police arrest the other suspect who PW1 identified at the police station.

12. On cross examination by the 1st Appellant, she stated that she saw him very well, he had the same gumboots the next morning as he pretended to console her. When cross examined by the 2nd Accused, she said that the 2nd Accused, whom she had known since birth and who used to live with an aunt married in the area to the witness' relative, took her torch as he went to PW1's room. She admitted that her family took PW1 from his house after he took her in as his wife at the age of 14 years while she was pregnant adding that part of the stolen maize was recovered and left at the police station.

13. Upon cross-examination by the 3rd Accused, the witness stated that she saw the accused at her home and that he could not have been at a funeral. That the cut wire mesh and part of the stolen maize was recovered and kept at the police station.

14. On re-examination she refuted claims that she had lodged a complaint against the 1st Appellant because he had a past relationship with PW1.

15. PW3, the Assistant Chief [Particulars withheld] Sub Location testified that on 1/5/2017 he was at his office when he received a call from 'nyumba kumi' informing him that PW1 had been defiled. He headed to the home of PW2 where he saw a broken window in the kitchen and PW1 and PW2 narrated to him how men broke into their home, robbed them and defiled PW1. The 1st Accused was identified by PW1 who in turn led them to the arrest of the 1st Appellant. PW1 also identified the 2nd Appellant.

16. On cross examination by the 1st Appellant he stated that he was not aware that he had travelled from Nairobi the day of his arrest.

17. PW4 was a son to PW2. On 1/5/2017, at about 6 a.m., he received a call from his mother informing him that they had been attacked. He headed to his mother's home and PW1 informed him that she had been raped by Rodgers and Victor. They looked for them and found them since he knew them and he later received information that the 4th Accused was selling maize in the company of the 2nd Appellant. He headed to the scene in the company of the police and the 2nd Appellant was arrested with the 4th Accused escaping but he was later arrested.

18. PW5 testified that he examined PW1 at Shinyalu Model Hospital on 1/5/2017 and noticed that she had a CS scar, blood on her thighs, swelling and laceration on her private parts. A lab test revealed presence of spermatozoa.

19. He formed the opinion that she had been defiled. He then completed a P3 and Post Rape Care Forms which she produced as exhibits.

20. The 1st, 3rd and 4th Accuseds had no questions for the witness but on cross-examination by the 1st Appellant, he stated that no DNA was conducted to establish whose spermatozoa it was that was found in the victim but reiterated that the attackers were well known to their victim.

21. PW6 was the Investigating Officer who testified that he was attached to Shiasasari police post and that on 2/5/2017 while at the station, he received a complaint from PW4 that his mother had been attacked at her home by young men who robbed her and defiled a child. He came to learn that a similar complaint had already been made to the 'nyumba kumi' and with the aid of the Assistant Chief, the 1st Accused had been arrested and so he recorded his statement. The other Accused persons were equally arrested with the help of the Village Elder and the 'nyumba kumi' official. The reports indicated that

PW1 had been defiled by the Appellants, persons she was familiar with. The 3rd Appellant and 4th Accused were later arrested on suspicion of selling the stolen maize from PW2. The investigations however exonerated Lawrence Muhanji but implicated his brother, the 4th Accused as a perpetrator.

22. On cross-examination by the 1st Appellant, he stated that they never made any recoveries of the stolen items but that the victims saw the Accused persons very well with the aid of flushes from the torches.

23. When cross-examined by the 2nd Accused, he told the court that the first report was by Kizito Shikami in the company of the complainant. He reiterated that no recoveries were made but that investigation revealed that the attackers gained entry into the house by breaking the kitchen window. He said that the Accused was implicated by the co-Accuseds who had been arrested earlier. He admitted not having escorted that Accused to the hospital.

24. Nothing material came out of cross-examination by the 3rd Accused. However, from the 4th accused, the witness told the court that investigations revealed that he was the person who took the maize to the home he shared with a brother called Lawrence, who was exonerated, at 4 a.m. He repeated that no recoveries were made.

25. The evidence of PW6 marked the close of the prosecution's case with the court ruling that a prima facie case had been established and the Accused persons were thus put on their defence. In their defence, each of the four Accuseds testified on oath without calling other witnesses.

26. The 1st Appellant testified as DW2 and gave sworn evidence in which he denied the charges and advanced the defence of alibi to the effect that on 30/4/2017 he was travelling from Nairobi to Kakamega to collect his National Identity Card on the 1st day of May, 2017. He produced a bus ticket for Mbukinya bus in that regard. He stated that when he arrived, he went to the Assistant Chief, Etenyi, to make the collection and was asked to wait. He was then called to the office and arrested then taken to the police station. He claimed that he met PW1 in the month of January 2016 and that she was pregnant at the time and she was not in school.

27. He recalled that one day he received a call from the complainant informing him that she would be visiting him and when she came, she had her clothes with her and he welcomed her and they stayed together until she went into labor and he took her to hospital and her family thereafter took her back. He claimed that the family of the complainant had a grudge with him because he had not paid dowry. He stressed that nothing was recovered from him as an exhibit and that he was not examined by a doctor as per the requirement of Section 36 of the *Sexual Offences Act*.

28. On cross-examination by the prosecutor, he stated that he did not have the waiting card for the collection of his National Identity Card because the same was taken by the Assistant Chief adding that he had lived with PW1 as his girlfriend for about two to three months. He alluded to having been engaged as a hotel worker but had nothing to show for such. Not the employer or a colleague was lined up as a witness, he admitted. He further confirmed that he knew PW1 very well and that she could not have had a grudge against him.

29. The 2nd Appellant, who testified as DW2, denied the charges and stated that one morning in the month of May 2017, he opened his door and saw people walk into the compound. They told him that they needed his evidence, was taken to the home of PW2 and was then arrested by police officers. He was then asked if he had heard anything the previous night but he answered in the negative.

30. He then discounted the prosecution evidence by stating that no exhibit was recovered from him at all, that the evidence related to an incident of 30th April and not 1st May and that the evidence of PW1 and 2 were not reliable.

31. On cross-examination he stated that he had been living with his sister in Mumias since 20th January, 2017 together with other people but he had opted to call none as his witness. He however confirmed that PW2 was his neighbour since birth but added that he never knew the co-Accused persons who he met for the first time at the police station and in court.

32. Even though the other Accused persons equally gave evidence on oath, the two are not parties to this appeal and their evidence deserves no regurgitation here but the court has perused same and will give regard to any bit that connects with the appeal, either way.

33. By its judgment delivered on 27/5/2019, the trial court convicted the Appellants of the offence of burglary and gang defilement and thereafter sentenced each of the two Appellants to serve a jail term of three years for the offence of burglary and 15 years for gang defilement. The sentences were ordered to run concurrently.

34. Aggrieved with the conviction and sentence of the trial court, the Appellants lodged the two separate appeals which were then consolidated to be heard together.

35. The 1st Appellant's appeal is premised on the grounds that; he was convicted on a defective Charge Sheet, the evidence tendered was inconsistent and uncorroborated, penetration was not proved, the trial offended Article 50 (2) of *the Constitution* of Kenya, 2010 and that the burden of proof was shifted to him thus misevaluating his defence of alibi.

36. The 2nd Appellant's appeal is premised on the grounds that; his trial offended the provisions of Section 194 of the *Criminal Procedure Code*, Article 50(2)(j) of *the Constitution* of Kenya, 2010, Sections 36(1)(2) and (3) of the *Sexual Offences Act*, his conviction was based on flimsy evidence, his defence was rejected and the trial court erred in holding the evidence of PW1 as credible and free from error without inquiring the length of time that had lapsed before PW1 made a formal complaint.

37. The appeal was directed to be canvassed by way of written submissions. The parties, Respondent and 1st Appellant, have duly complied with the directions and the court duly appreciates the industry by both Counsel. Even though the 2nd Appellant did not file submissions, that by itself does not diminish the courts responsibility and obligations on a first appeal. The court has reminded itself of the law that a first appeal is by way of re-hearing and it has to fully and exhaustively re-appraise and re-evaluate the evidence afresh with a view to coming to own conclusions based on such re-examination.

1st Appellant's Submissions

38. It is his submission that the prosecution failed to prove the offence of burglary since PW2 testified that the thugs allegedly accessed the house by breaking a window and yet no fingerprints were dusted to compare with his. He further stated that none of the stolen items were recovered from him yet the police arrested him six hours after the incident and they were therefore obligated to at least search his house which they did not. He contends that in the absence of any of the lost items which included maize and three chicken, the offence of burglary was not proved since it was only the law of recent possession that would have linked him to the offence. He claims that he is a victim of vengeance since the complainant's Uncle did not approve of his marriage to the complainant.

39. He further submits that the Appellants could not have been properly identified since the incident happened at night noting that PW1 and PW2 woke up to learn that their house had been broken into. They must have been terrified and shaken to have the composure to facilitate positive identification.

40. On the charge of gang defilement, he questions why he was not subjected to medical examination considering that the he was arrested less than six hours after the incident.

41. He lastly submits that the Charge Sheet was defective for the reason that it was amended severally making it difficult to tell which charge sheet was used by the court.

Respondent's Submissions

42. The Respondent asserts that, it cannot be true that the 2nd(sic) Appellant's trial offended the provisions of Section 194 of the *Criminal Procedure Code* because there were hearing proceeded on various dates and the record shows that the Appellants were present at all hearings in person. The Respondent cites the proceedings of 21/5/2018, 28/5/2018, 21/6/2018, 25/7/2018, 23/8/2018, 16/11/2018 and 27/2/2019 as captured on the record of appeal to show that the Appellants were always present at the trial.

43. On the ground that the trial violated the Appellants' right under Article 50(2)(j) of *the Constitution* because the Appellants were not supplied with witness statements, it is submitted that the proceedings show that at all instances the Appellants were recorded as being ready to proceed with the trial and never complained of lacking witness statements. The position taken is that the silence and willingness to proceed with the trial can only imply that they were supplied with statements. The Respondent thus cites the case of SMK V Republic (2019) eKLR for the proposition that where an order is made for the supply of witness statements and thereafter no complaint of failure to supply is recorded, the court is entitled to infer that the statements were duly supplied.

44. On the fault that there was never medical test to prove if they committed the offense of defilement, contrary to Section 36(1)(2) and (3) of the *Sexual Offences Act*, it is submitted that Section 36 is not crafted in mandatory terms but passively. The Respondent then cites the decision in Royton Muriungi v R (2020) eKLR adding that according to Section 124 of the *Evidence Act*, a court can convict an accused person in a sexual offence case based on the evidence of the victim alone, provided the evident be cogent and the court believes the witness.

45. On the allegations that the Charge Sheet was defective, it is submitted that the Charge Sheet was amended severally to add the Accused persons who were arrested subsequently, but such amendments did not import any defect. It is further argued that an amendment to a Charge Sheet does not, by itself, make it defective.

Issues for Determination

46. The court has dutifully perused the record of appeal and the submissions by the Respondent and identifies the following five issues to arise for its determination:

    a. Whether the charge sheet was defective?

    b. Whether the trial offended the provisions of section 194 of the Criminal Procedure Act, sections 36 (1)(2) and (3) of the *Sexual Offences Act* and article 50 (2) (j) of *the Constitution* of Kenya, 2010?

    c. Whether the element of penetration for the offence of defilement was proved to the requisite standards?

    d. Whether the offence of burglary was proved against the appellants?

    e. Whether the burden of proof was shifted to the 1st appellant when he raised the defence of alibi?

Analysis

Whether the charge sheet was defective

47. While the 1st Appellant contends that the Charge Sheet was defective in substance and form, the answer to that complaint must emerge from the provisions of Section 134 of the *Criminal Procedure Code* coding what for the ingredients of a Charge Sheet ought to be. The provision stipulates:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

48. In the instant case, the Charge Sheet dated 28.05.2018 shows that the Accused persons were properly identified, the statement of the main counts and the alternative to count I, as well as the particulars of when, where and against whom the offences were committed were duly and property given.

49. For a Charge Sheet to pass as defective, it must be demonstrated or be apparent that; the alleged offence is unknown in law, the offence is not disclosed nor stated in a clear and unambiguous manner so that the Accused may be able to plead to specific charge that he can understand and be able to adequately prepare his defence. See Sigilani v. Republic (2004) 2 KLR, 480.

50. The court having read the Charge Sheet is satisfies that the offence of burglary contrary to Section 304(2) and stealing contrary to Section 279(b) of the *Penal Code*, framed against the four Accused persons, and that of gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006, framed against the two Appellants now before the court, fully met the dictates of Section 134, *Criminal Procedure Code*, in full. The two counts prefer offences created by the two statutes, unmistakenly identify the Appellants, then give an adequate narration of the particulars of the offenses. That challenge is determined to be unfounded and is dismissed. The first issue is thus answered in the negative. In any event, merely that the Charge Sheet was severally amended, does not, ipso facto, import a defect to it.

51. It is not just enough to assert that the Charge Sheet is defective. The Appellant or Accused so asserting must demonstrate that.

Whether the trial offended the provisions of Section 194 of the Criminal Procedure Act, Sections 36 (1) (2) and (3) of the *Sexual Offences Act* and Article 50 (2) (j) of *the Constitution* of Kenya, 2010?

52. Section 194 of the Criminal Procedure Act stipulates that unless as otherwise expressly provided, all evidence taken in a trial under the Code shall be taken in the presence of the Accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).

53. Looking at the proceedings of the lower court, the prosecution witnesses testified on 5/7/2018, 25/7/2018, 23/8/2018 and 16/11/2018 and in all those instances the Appellants are recorded and shown to have been present in court and cross-examined the witnesses. Where either opted to ask no questions, the court dutifully had that recorded. There is nothing on record to support this ground of appeal. The court is satisfied and thus finds that Appellants were present throughout the trial.

54. On the other hand, Section 36(1) of the *Sexual Offences Act* also gives the court the lee way, in fairly permissive language, to direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and

other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

55. The provision is clearly permissive and not crafted in mandatory terms. It is for the court, in own discretion, when it appears to it that the results of such test would serve the ends of justice, to so direct. It must be noted that this is one of those provisions that calls upon the court to actively manage the case rather than acting an uninterested arbiter. The provision, in the courts view underscores the severity of injury inflicted upon the society by sexual offences. It is thus not a duty, but a discretion of the court to order such tests. See Mutingi Mumbi –v- R. Cr. Appeal No. 52 of 2014 (Malindi).

56. It is therefore not mandatory, as suggested by the Appellants, in every case, for the offender of a sexual offence to be subjected to medical examination in order to prove that a sexual offence or penetration occurred.

57. Turning to Article 50(2)(j) of *the Constitution* of Kenya, 2010, the law accords an accused person the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. The Appellants contend that they were denied this right.

58. At page 9 of the record of appeal, the trial court records that the accused persons had been supplied with copies of the witness statements and during that day all the accused persons, including the Appellants, were present in court and none contested this position. The court finds no merit on this fault against the court and accordingly answers the second issue in the negative.

Whether the offence of burglary was proved against the Appellants

59. The Appellants were charged with the offence of burglary under Section 304(2) of the Penal code. The section defines burglary as house breaking, as defined under Section 304(1) of the *Penal Code*, which occurs at night.

60. In this case, it is not disputed that the incident occurred at night. PW2 gave evidence that she was asleep when she heard the door drop. The Assistant Chief who testified as PW3 stated that on visiting PW2's home the day after the incident and noticed a broken window in the kitchen. These are all signs of forced entry by the Appellants into PW2's house. Forceful entry connotes unlawful and uninvited entry into the house of another.

61. PW1 testified that the 2nd Appellant, using a panga, cut the maize sack in her room and left with the maize. They then ransacked her purse and stole a sum of Kshs. 915/- which was milk proceeds. PW2 further testified that after cutting the maize sack, all the accused persons helped each other in dividing and packing the maize in smaller bags. All the while, the gang had torches on, thus illuminating the room. In fact, the evidence of PW1 and PW2 was clear that the Appellants sat and lingered very proximate to them and even spoke to both.

62. There is thus no doubt that the Appellants were undeniably identified to have been part of the gang that unlawfully entered the house of PW2 and while there took with them maize in bags as well as Kshs. 915/- removed from a purse in possession of PW1. That no recovery was made does not diminish the otherwise cogent evidence of the two witnesses who saw the Appellants commit the unlawful acts. That evidence adequately displaces the timid defence of the Appellants alleging having been away from the scene.

63. The court thus finds and holds that the evidence of PW1, PW2 and PW3, placing the Appellants at the scene and time of the offense, proves beyond reasonable doubt, the offence of burglary and stealing contrary to Section 304(2) as read with section 279(b) of the *Penal Code* burglary against the Appellants and I therefore find that the prosecution discharged their burden of proof.

Whether the element of penetration was proved

64. Section 2 of the *Sexual Offences Act* defines 'penetration' to be the partial or complete insertion of the male genital organ to the genital organ of a female.

65. The complainant testified as PW1 and she narrated how the Appellants got into her room in turns. The 2nd Appellant was the first to enter her bed, pulled down her pants and has sex with her. After he was done the 1st Appellant also had sex with her. Even though the evidence of a sexual assault victim need not be corroborated, under Section 124 of the *Evidence Act*, the testimony by PW1 was corroborated with that of PW5 who testified that he examined the complainant at Shinyalu Model Hospital on 1/5/2017 and noticed that she had blood on her thighs, swelling on her private parts and that a lab test revealed presence of spermatozoa. He formed the opinion that she had been defiled.

66. The Appellants have faulted the conviction on this count on the basis that no medical tests were conducted to connect the spermatozoa with them. The court has determined that, that failure is not fatal to the conviction because it is at its discretion to direct that the tests be conducted.

67. On the burden and standard of proof, the court finds, as the trial court did, that the evidence tendered sufficiently proved the offence charged and beyond reasonable doubt and that, therefore, the conviction was sound and safe. It thus deserves no interference.

Whether the burden of proof was shifted to the 1st Appellant when he raised the defence of alibi

68. It is never in doubt that the incidence and burden of proof in criminal cases rests with the prosecution. However, there is always a distinction between the legal and evidentiary burden. So, when it is said that the burden rests upon the prosecution throughout, the burden talked about is the legal burden. On the other hand, the evidential burden arises and vests upon the defence after the prosecutor has established a prima facie case that would otherwise entitle the court to convict, if no other evidence is led to create a reasonable doubt that the Accused may or may not have committed the offence.

69. After the court found the two Appellants with a case to answer and put both on their defence, both gave evidence and mounted a defence of having not been at the scene but away from it. The 1st Appellant contended and gave evidence to the effect that during the night of the incident he was travelling from Nairobi to Kakamega for the purpose of collecting his national identity card from the Assistant Chief's office. He produced a bus ticket in that regard. Upon being cross-examined, he was unable to show the waiting card to show that indeed he was due to collect the document. In addition, he was asked whether he had any person like a workmate or the boss to confirm by evidence or document that he was indeed in Nairobi for employment and not in the village but he was unable to.

70. On his part, the 2nd Appellant denied having been at the scene and that he was arrested the next day after having been mislead that he was wanted to offer evidence. He alluded to have been staying in Mumias and not at home adding that no recovery of the stolen items had been made to connect him to the offence. On cross-examination, he admitted that in Mumias he was living with other people who would have given evidence but he was not keen to call them.

71. The trial court was not impressed or satisfied that the alibi defenses offered were true and discounted same in its judgment. This court notes that the alibi was alluded for the first time in the defence and not even during cross examination. The court views the defense to have been an afterthought over and above the fact that it appears to have been just conjured up. The trial court as the trier and master of the facts was not persuaded that the defence was true or credible. On a first appeal, and having reexamined the record afresh, this court finds that the trial court cannot be faulted.

72. In coming to that conclusion and in addressing the appellants' complaint that their alibi defense was ignored, the court is guided by the decision of the court of appeal in the case of Victor Mwendwa Mulinge v Republic [2014] eKLR where the court in discussing the burden of proof for 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;...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."

73. In this matter, away from the fact that the alibi defense was raised too late and in a manner that denied the prosecution the opportunity to test its credibility by investigating same, the same was also never cogent and was poked and shown to have been not true. The trial court was thus perfectly within the law to have disbelieved that defence. The consequence is that the prima facie case established by the prosecution at the close of its case remained uncontroverted at the close of the defence case. The resultant conviction was thus well founded and overtly safe. It invites no interference and is thus upheld with the inevitable consequence that the appeal is bereft of any merit. The appeal is thus dismissed in its entirety.

74. Right of appeal within fourteen (14) days.

DATED AND SIGNED THIS 12TH DAY OF JUNE, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 26TH DAY OF JUNE, 2025.

S. MBUGI

JUDGE

In the presence of:

Ms. Osoro for the DPP on-line

Appellant present on-line

Court Assistant: Ang'ong'a