



Munene & another v Republic (Criminal Appeal E189 & 190 of 2022 (Consolidated)) [2024] KEHC 8127 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E189 & 190 OF 2022 (CONSOLIDATED)**

**LW GITARI, J
JUNE 27, 2024**

BETWEEN

DESMIRIO MUNENE 1ST APPELLANT

KELVIN MWENDA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentencing of Principal Magistrate at Nkubu Law Courts delivered by Hon. J. Irura (P.M) dated 11th August 2020 in Sexual Offences Case No. E028 of 2019)

JUDGMENT

Introduction:

1. The appeals by the appellant were consolidated.
2. The appellants were charged with the offence of Gang Defilement Contrary to Section 10 of the [Sexual Offences Act](#) 3/2006 of the Principal Magistrate's Court Nkubu Sexual Offence E028 of 2019.
3. The particulars of the charge are that the appellants on the night of 15/9/2019 and 16/9/2019 in Imenti South Sub-County within Meru County, jointly intentionally and unlawfully caused their penis to penetrate to vagina of J.K.K a child aged fifteen (15) years. In the alternative the appellants were charged with committing an indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) in that on the same date and place they intentionally and unlawfully touched the vagina of J.K.K. a child aged 15 years. The appellants pleaded not guilty and a full trial was conducted. The appellants were found guilty of gang rape and sentenced to serve ten (10) years imprisonment.



The Appeal:

4. The appellants were dissatisfied with both the conviction and sentence and filed this appeal which based on six grounds which were later amended in his amended supplementary grounds of appeal as follows:-
 1. That, the learned trial magistrate erred in both matters of law and fact by failing to note that the finding of the clinical officer does not support the offence of gang defilement.
 2. That, the learned trial magistrate erred in both law and facts by failing to note that the period spent in custody (under Section 333(2) was not considered.
 3. That, the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution failed to summon crucial an vital witness who could have shed light in this matter.
 4. That, the learned trial magistrate erred in both law and fact by rejecting the appellant's defence without giving cogent reasons.
5. They prays that the appeal be allowed, sentence be set aside and they be set at liberty.
6. The respondent opposed the appeal and in their submissions dated 25/4/2023 prayed that the appeal be dismissed and the sentence be upheld.

The Prosecution's Case:

7. PW1, Seberina Kaimathari, the clinical officer, testified that she had the P3 form in respect of the complainant herein aged 15 years and which was filed by her colleague whom she had worked with for over three years and conversant with both is handwriting and signature. The complainant gave a history of being defiled by two well known to her as her boyfriend and his friend. She further explained how she had gone to the club where they bought her a soda, she lost consciousness and later found herself dumped in the bush. She was drowsy at the time of examination with dirty clothes with no smell of alcohol but she was oriented in time, place and person. She had low blood pressure with visible injuries on her body.
8. Multiple lacerations at the vaginal opening, swollen erythematous and broken hymen were noted. Dead spermatozoa and epithelial cells were noted in red blood cells. Syphilis, HIV and pregnancy tests were negative but on urinalysis, it revealed pus cells, epithelial cells and red blood cell. She added that the presence of bruise and laceration on vaginal walls, opening and broken hymen together with the presence of dead spermatozoa were highly indicative of a very traumatic inhuman vaginal penetration. Presence of drowsiness was highly suggestive of having taken chemical causing loss of consciousness which was supported by the duration of the complainant's reports of not being aware of her surroundings.
9. The low blood pressure was as a result of the chemical poisoning. She also produced the medical documents inclusive of the laboratory tests results as exhibits. In cross examination, she said the accused persons were not availed in hospital for examination.
10. PW2, the complainant, J.K. testified that she was 15 years old having been born on 15/1/2004 and form one student at [Particulars Withheld] School. She knew the accused persons as she used to see them together as they went to farm but on 15/9/2019 at about 4 pm she was heading home from school while in the company of two others. When she arrived at home, she took her skirt took it to Mutiokiam market for repair when she met the appellants on a motorcycle and they greeted her and Titus who reaching the market he went on his way.



11. On her way back home she met with the same appellants on motorcycle which they asked her to board as they were heading towards her home's direction. Instead, they went to Lotters Club within Nkubu Township where Munene and her took sodas while Mwenda took a bottle of beer. When the soda was taken to her it was open which they took using glasses as they shared one soda but she never left her seat and did not eat anything. They then left the club while it was dark but then she lost consciousness. When she regained consciousness the next day at around 11 am where she found herself at (Particulars withheld) Market in a room partitioned with plywood and which had one bed, a table and seat.
12. She found herself wearing all her clothes but was feeling tired and her legs were aching with pain in her private parts. She walked home where she found her parents waiting for her. She changed her clothes and went to the Chief's camp at Kathithine where she found the accused persons. He asked where she had been found and she told him the place. They went to Ntharene where her School Principal picked her and took her to Ntharene Police Post then taken to Kanyakine Hospital where she was examined. The accused persons were arrested but she did not know the owner of the house she found herself in.
13. On cross-examination she stated the 1st appellant was the rider of the motorcycle. She was still sleeping in the house when the appellant was arrested for the Chief had been told she had been seduced with them. She was sure she proceeded to the club in the company of the appellants but then she lost consciousness only to regain it the next day at 11a.m.
14. PW3, PK, the complainant's mother, corroborated the fact that the complainant was born on 15/1/2004 and she used to see the appellants riding motorcycle but she did not know their names. On 15/9/2019 she prepared her children and herself as she went to preach in their church and thereafter she went back home. In the evening they had a service at their Reverend's home so she only returned home at 6pm. When she arrived her youngest daughter informed her that the complainant had not returned home after church she went to school to write some notes. She then went home in the company of Wincate, fed the cows then they left.
15. They went to Wincate's home where Wincate informed them they had parted ways at 4.30pm where the complainant said she was going to the market to have her skirt repaired. They went back home to wait for her but she never returned. In the morning she went to report to their sub-chief but even after waiting for him he did not show up so she decided to report to the school's principal who called Wincate and asked her what had happened the previous day. She explained to them the complainant was carried by some people on a motorcycle but could only identify one of them by his nickname as Koroso. The principal enquired from a school worker if she knew such a person.
16. They reported to the sub-chief of what had happened so that he could assist them in arresting the suspect. Since he was waiting for the other sub chiefs in the area, he called and informed the chief of same. The appellants were arrested at (Particulars Withheld) market before they reached there and they proceeded to their homes to see if they could find the complainant but it was in vain and their mothers said they had not spent the night at their homes. The appellants were taken to chief's office and as she was going home, she saw the complainant going home.
17. She let her change her clothes then they proceeded to the Chief's office, took the clothes she had removed and reported at Ntharene Police Post. At the Chief's office the complainant said the accused persons were the ones who carried her on a motorcycle but at the post they were referred to the hospital. The complainant looked tired and was walking abnormally as she said she had pains in her private parts. She was examined and the doctor said she had bruises in her private parts. She was given medication as she asked her what happened. She explained she had taken her skirt for repairs when she met with the appellants who asked her to board their motorcycle and she did not alight at home as they said they were going to buy her a soda.



18. They got to a club where she shared a soda with one of the appellants while the other took a beer. They then left the club, boarded the motorcycle but then she lost consciousness only to wake up on a bed in a house she had not been in before. She denied her family had any grudges with that of the appellants and she produced her daughter's birth certificate. In cross-examination she said there were people who saw the appellants carrying the complainant on the motorcycle and she gave the description of the appellants and the registration number of the motorcycle. The appellants had sexual intercourse with her daughter while she was unconscious.
19. PW4, Juster Nkatha, stated that she knew the 1st appellant as Kigati's grandson while the 2nd accused was known as Koroso. On 15/9/2019 she was heading to Mutiokiana when he saw the appellant on a motorcycle while the complainant was standing near them. She passed them but after a short while the motorcycle passed her with the appellant and the complainant on board, they stopped at Mutiokiana market, she alighted, rushed somewhere then boarded the motorcycle again. She went on her way but the next day she heard the complainant's mother was looking for her and she informed her where had been see the complainant with the appellants. She was informed that the appellants had already been arrested but she denied having any grudge against them.
20. PW5, Dionisio Muthuri Miriti, the assistant Chief Kithatu Sub-Location testified that he used to know the appellants and their homes but he came to know the complainant on 16/9/2019 as they were at the Chief Office when a certain woman reported that he daughter did not go back home the previous evening. She explained how she was said to have been seen with two people while being carried on a motorcycle from (Particulars Withheld) area. The Chief instructed them to go arrest them as she gave their description. This was not the first time they heard of such a case as they had of another where 2nd appellant had locked a student in his house but the 2nd appellant and the relatives stopped following up on the case.
21. They went to 2nd accused's home where they found his mother who said she had not spent the night at home. He described the 2nd appellant's house. On their way back, they saw the two appellants next to a shop at (Particulars withheld) market and they had a motorcycle. They arrested them and escorted them to the chief's office. Later the complainant's mother went there in the company of the complainant where she informed them the appellants had taken her to Nkubu, bought her soda and only regained consciousness in a bush with dirty clothes. She denied having any relationship with them and it was the only time they had carried her. They escorted the appellants to Ntharene Police Post but they denied being with the complainant the previous night. He denied holding any grudge against them.
22. On cross-examination he said at the time of arresting the appellants they informed them they had been seen carrying the complainant on the motorcycle. He was able to identify the 2nd appellant from the description they had been given and he had been involved in a similar incident before but he denied during interrogation that he had been involved.
23. PW6, No.221402 Sgt Shukri Hassan testified that he took over the matter from his colleague after he was transferred but he was the in-charge of Ntharene Police Post where the principal of Kithanararo Secondary School in the company of the complainant's mother reported of the complainant being taken by the two appellants. She had been taken to Lotus Club in Nkubu where the appellants gave her alcoholic drinks and left the club at 8pm. The next day she regained consciousness in a house she had been taken by the appellants and she walked back home. When she disappeared, her parents had made a report to the area chief and the said school's principal and when she returned home, they notified the two officials.



24. The appellants were arrested by the area Assistant Chief who took them to the post and since the complainant informed him she had been defiled and had difficulties in walking. He referred them to Kanyakine Hospital where she was treated and P3 form filed. Her birth certificate indicated she was 15 years old.

Defence Case:

25. The appellants on being placed on their defence tendered sworn evidence and called two witnesses. 1st appellants testified that in the morning he requested the 2nd appellant who was boda boda rider to take him Maraa from Ntharene Market. They proceeded to his uncle's place and when they did not find him and on their way back they found the complainant who stopped them. She told them she wanted to be taken to Kanyakine market so they agreed to pass there for him to also collect something. They went, picked the money and went back to the market. The complainant asked the 2nd appellant to take her to Nkubu and he agreed to charge her Kshs.200/- where they went to cross hotel where he bought her a soda. The complainant left only to return later saying the person she was to meet had not arrived.
26. They left her there and went back to Kanyakine where they bought the electrical items then they went home where he found his parents and gave them the items he had bought. The next 2nd appellant went to him and asked him to take him somewhere to cut bananas but they stopped at the market for him to buy him tea. It was when the chief and his assistant went there with motorcycles they arrested them and said there was a girl they had left her at Nkubu waiting for someone who had not yet arrived. They looked for the complainant at their houses but they did not find her but at Kathithine, the girl was asked if they were the ones but she did not respond. They were taken to the post and later charged in court.
27. The 2nd appellant corroborated the 1st accused defence and in cross-examination he said the complainant was unknown to him as he only met her the day she requested him to carry her to Kanyakine.
28. DW3 Andrew Kirimi testified the 1st appellant was his son who on that night went home while carried by the 2nd appellant on his motorcycle. They ate supper then they went to bed. The next morning the 2nd appellant went for him as they were going to cut bananas and 30 minutes later they called saying they had been arrested. In cross-examination he said he did not know where the 1st appellant had spent the whole day.
29. DW4 Eliphaz Nyamu was the 2nd accused's father who said on that night his son went home at 8pm, parked his motorcycle in their house, he was served supper and thereafter he went to bed. The next morning, he was served breakfast and went to cut bananas with the 1st appellant when he received a report that they had been arrested. In cross examination he said he did not know where the son was the next day and she he followed up he was informed they were arrested over a certain girl.

Analysis and Determination:

30. This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is *Okeno v Republic* (1972) EA 32 where



this duty was discussed. This was buttressed in the case of *Kiilu & Another v Republic* (2005) 1 KLR 174 where the Court of Appeal stated:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses.”

31. I have considered the appeal, the proceedings and Judgment before the trial court and the submissions by the appellant and the respondent. The issues for determination are:
1. Whether the medical evidence corroborated the fact of gang rape.
 2. Whether the prosecution failed to call crucial witnesses.
 3. Whether the defence of the appellant was considered.
 4. Whether the learned trial magistrate erred by failing to take into account the time the appellant spent in custody awaiting trial.

Whether the medical evidence corroborated the offence of gang rape:

32. The appellant was charged with gang defilement. The offence of defilement is defined under Section 8(1) of the *Sexual Offences Act*. The section provides as follows:-

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

33. The ingredients of the offence of defilement are proof of age of the victim, the identity of the perpetrator and penetration. The prosecution has the burden to prove ingredients where a person is charged with defilement. In this case the appellant charged with gang defilement under Section 10 of the *Sexual offences Act*. The Section provides:

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

34. So, in addition to the above ingredients of defilement, the prosecution is required to establish the elements of gang defilement which include-
- i. That the unlawful act was committed in association with another or others or
 - ii. Being in the company of another or others who commit the offence with a common intention of committing the offence.
35. The prosecution has to prove the positive identification of the perpetrator.



36. On penetration, Section 2 of the *Sexual Offences Act* defines Penetration as:-

“the partial or complete insertion of the genital organs of a person into the genital organ of another.”

37. Thus penetration need not complete insertion of the genital organ, partial penetration on the genital organ where proved is sufficient to prove penetration. This was held in the case of *Mark Quirui Mose v Republic* (2013) eKLR where the Court of Appeal stated:-

“... Many times the attacker does not fully complete the sexual act during commission of offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girls organ.”

38. Penetration is proved by the testimony of the victim and corroborated by medical evidence. However it is not necessarily that medical evidence be availed to prove penetration. The appellant in his submissions states that the clinical examination report did not link him with the ordeal. He submits that there was no evidence that the complainant was forcefully raped. The appellant’s submission is sham as he has chosen to selectively quote the testimony of the clinical officer. From the record, the clinical officer (PW1) testified as follows:-

“On examination the clothes were dirty. She was drowsy but oriented in place, time and person. She had no smell of alcohol. She had low blood pressure of 66/44. The normal range is between 110/80. There were no noted injuries on other parts of the body.

The approximate age of the injuries was diverse hours from 15/9/2019 at 5.30 pm to 16/9/2019 at around 11.00 a.m when she regained consciousness. A blunt object was used to inflict injury which had been forcefully forced into her. Laboratory tests were done and she was out PEP P2 Antibiotics and painkillers. In respect of section C the offence was defilement. The complainant was aged 15 years. The complainant was aged 15 years. The complainant had multiple lacerations at vaginal opening. Vaginal carnal and cervix. The whole genitalia was swollen, erythematous and the hymen was broken. There was spermatozoa which was dead, red blood cells and epithelial cells were noted on laboratory tests.... The presence of bruises and laceration on the vaginal walls and opening and broken hymen together with the presence of the dead spermatozoa in the test is highly indicative of a very traumatic inhuman vaginal penetration. Presence of drowsiness is highly suggestive of having taken a chemical causing loss of consciousness which is supported by the duration the victim reports to have been aware of her surroundings. Low blood pressure of 66/44 can be as a result of the chemical poisoning.”

39. See page 9 of the record line 9 to page 10 line 14 of the record. The clinical officer produced the P3 form as exhibit -1 and it indicates that the injuries were classified as grievous harm. With this evidence the positive finding was on the genitalia of the complainant which is the relevant finding in view of the nature of the offence. The finding that the injuries were grievous harm corroborates the evidence of the complainant that she was defiled. The fact of rape is proved by the testimony of the complainant and supported by the medical evidence. The complainant’s testimony was that while in company of the appellant and his friend, she took soda after which she became drowsy until the next day at 11.00 am. It has been proved and the appellants do not deny that they were with the complainant up to where they left the club. Even as she was being examined by the doctor she was still drowsy. I find that the appellant and his friend administered an unknown chemical which made the complainant to be unconscious



with a common intention of defiling her. I find that the fact of penetration was proved to the required standard with the evidence of the complainant which was well corroborated by Medical Evidence.

40. On the identity of the perpetrator, the complainant testified that it is the appellants who carried her on a motor bike and they went to a club at Nkubu town. She (PW2) told the court that she knew the appellants by their names and singled out the 1st appellant as her boyfriend. There was therefore no possibility of mistake. The appellants admitted what the PW2 told the court on how they carried her and offered her a soda. They went to the club where she took soda. Being her girlfriend I do not see how the 1st appellant could have left her behind in the club. PW2 testified that after they took sodas, they went outside the club when she was already drowsy. After that she could not remember what happened until she found herself the following day at 11.00 am. I find that the appellants who were well known to the complainant were positively identified as the perpetrators. The appellants were together all through. The appellants admitted in their sworn defence that they were with the complainant upto where they left the club. It is at this same point that the complainant had started feeling drowsy after taking a soda. The appellants had formed a common intention to stupefy the complainant with unknown chemical. The prosecution proved beyond doubts that the appellants were together and had a common intention to defile the complainant. (See also the testimony of PW4). The medical evidence adduced by PW1 corroborates the testimony of the complainant that a chemical was administered which led to low blood pressure as a result of effects of chemical poisoning. The evidence adduce proves that the appellants committed the offence after forming a common intention. The appellants were with the complainant all through upto to the point where she became drowsy. Being the last persons to be with her leads to the reasonable conclusion that they are the ones who defiled her. The law allows the court to reach that reasonable conclusion where there is no plausible defence offered and I find this to be the position in this case. The common intention between the appellant and his friend is proved. On the age of the complainant, she gave her age as fifteen years and this was confirmed with the production of the birth certificate. The age of the complainant was proved to the required standard. The clinical officer proved the age of the complainant and therefore corroborated her testimony. See *Francis Omuroni v Uganda* C.A Uganda Criminal Appeal No.2/2000.

Failure to summon crucial witnesses:

41. This is a sexual offence. It is now well settled that the court can convict on the testimony of the victim of the crime if the court for reasons to be recorded, the court believed that the complainant was telling the truth. Section 124 of the *Evidence Act* provides:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim 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.”

42. There is no requirement of corroboration where the court believes the testimony of the complainant. The learned trial magistrate held that the testimony of the complainant was credible as it was corroborated by the defence of the appellant that they were with the complainant in the pub where they took sodas. After that she was stupefied and only came to her senses the next day. The circumstances



disclose an offence under Section 27 of the Act and the appellants were lucky that the charge was not preferred. Section 27 of the [Sexual Offences Act](#) provides as follows:-

- “(1) Any person commits an offence if he intentionally administers a substance to, or causes a substance to be administered to or taken by, another person with the intention of -
- (a) stupefying; or
 - (b) overpowering that person, so as to enable any person to engage in a sexual activity with that person.
- (2) In proceedings for an offence under this section it is for the complainant to prove that the accused person administered or caused the alleged victim to take any substance with a view to engaging in a sexual activity with the alleged victim.
- (3) A person guilty of an offence under this section is, in addition to any other offence under this Act, liable on conviction to imprisonment for a term of not less than ten years.”

43. There was evidence adduced by PW1 that the presence of drowsiness is highly, suggestive of having taken a chemical causing loss of consciousness which is supported by the duration the victim reports to have not been aware of her surroundings.

44. Section 143 of the [Evidence Act](#) provides as follows:-

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

45. The prosecution has the discretion to determine the material, witnesses who are sufficient to prove their case and present them before court.

46. The prosecution can only be faulted if they fail to call witnesses who are material to the case with some bad motive. In *Bukenya v Uganda* (1972) EA.549 it was held with regard to the discretion of the Director of Public Prosecutions to decide the witnesses to call, the Judges stated:

“It is well established that the Director has a discretion to decide who are the material witness and whom to call but this needs to be 15 qualified in three ways. First, there is duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right but the duty to call any person whose evidence appears essential to the just decision of the 20 case (Trial on indictments Decree, S.37). Thirdly while the Director is not required to call a superfluity of witnesses if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference 25 that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution case,”

47. The witnesses which the appellant claims were not called were not material to the case as they did not witness when the offence was committed. In any case the prosecution called Justa Nkatha who saw the appellants carrying the complainant on a motorcycle and they left for unknown destination. Her evidence was in my view sufficient to proof that fact and more so because it is a fact not in dispute.



The prosecution is not supposed to call a host of witnesses to prove a fact. Only vital witnesses should be called by the prosecution in support of their case as required under Section 143 of the *Evidence Act* Supra. In this case it is my considered view that all crucial and the vital witnesses were called.

Whether the defence of the Appellant was considered:-

48. The appellant submits that the trial magistrate rejected his defence without cogent reasons. Article 50(2)(a) of the *Constitution* provides that ;

“ Every accused person has the right to a fair trial which included the right-
To be presumed innocent until the contrary is proved.”

49. This right guides all criminal trials as an accused person bears no burden to prove his innocence. The burden to prove the guilt of an accused person charged in court with a criminal offence lies in the prosecution’s back yard throughout the trial and the burden never shifts.

50. In the case of *Woolmington v DPP* (1935) AC 462, established the golden thread principle that, “in general the prosecution bears the burden of proof in Criminal trials.”

51. This is the cardinal principal of the Criminal Law not just in England and Wales but right across the common law world.

52. The standard of proof is that of beyond any reasonable doubts.

53 In the case of *Wangombe v Republic* (1980) KLR 149 the Court of Appeal held as follows:-

“... In *Sentale v Uganda* (1968) EA 365 at 368 Sir Udo Udoma C.J) said that a prisoner who puts a defence of *alibi* as an answer to a charge does not thereby assume any burden of proving the 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, and we have ourselves said so on more than one occasion. The defence of *alibi* was put forward the first time save four months after the robbery when the appellant made his unsworn statement in court. Even such circumstances the prosecution or the police ought to check and test the *alibi* wherever possible.”

54. The Court of Appeal in case of *Victor Mwenda Muringe v Republic* (2014) eKLR stated that:-

“It is trite law that the burden of proving the falsity, if at all an accused’s defence of *alibi* lies on the prosecution.”

55. The law on the defence of *alibi* as stated in the above authorities is that failure by an accused person to disclose an *alibi* defence at the earliest possible stage in the proceedings to enable the police to investigate it may weaken that defence. The appellant called a witness in his defence. I find that, that notwithstanding, the trial magistrate did consider the defence as he stated as follows:-

“In this case, I therefore find that the prosecution’s evidence was overwhelming against that of the accused persons defence and the evidence of their *alibis* was a mere afterthought for DW3 and DW4 testified that they could not tell where their sons were during the whole day after they were away.”

56. Notwithstanding that the defence was given late in the proceedings, the trial magistrate ably considered it and for good reasons rejected it as an afterthought. The court did not shift the burden of proof on



the appellant, instead it considered the defence and found that the prosecution had proved the case against the appellant beyond any reasonable doubts.

57. Looking at the evidence which was laid before the trial magistrate, this finding cannot be faulted. I find that this ground is without merits.

58. Whether time spent in prison awaiting trial was considered. Section 333(2) of the Criminal Procedure Code provides:-

“333(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.”

59. The Section requires that the time spent in custody awaiting trial be taken into account when passing sentence. The Court of Appeal while interpreting this section has stated that taking into account must mean considering the time spent in custody to reduce the sentence imposed proportionately with the time spent in custody. See Ahamed Abolfathi Mohammed & Another v Republic (2018) eKLR where the Court of Appeal stated-

“With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period spent in custody and still order the sentence to run from the date of conviction because that amounts to ignoring altogether the period already spent in custody.”

60. Thus if the person convicted for a criminal offence had spent time in custody while awaiting trial, the court has to consider that time and have the sentence imposed proportionately reduced by that time. This is an issue of fair trial because where a sentence is imposed and time spent in custody is not considered, the person may end up serving a longer period in prison than that intended when passing sentence.

61. The record of appeal shows that the appellants were arraigned in court on 18/9/2019. The same day the court ordered that the appellants be released on a bond of Ksh.300,000/- plus one like surety. On 24/10/2019 sureties were approved and the appellants were released. They were out on bond until the time the sentence was passed. They were in custody for thirty five (35) days. The period was not considered when passing sentence. This ground must therefore succeed.

62. There was no ground of appeal on the sentence. I find no reason to interfere with the sentence. The trial magistrate properly exercised his discretion and passed a sentence which in my view was quite lenient in view of the circumstances of the case and the trauma caused on the complainant. The State also disclosed an offence for which they were not charged. I will leave it at that as the law does not allow me to enhance the sentence as the State has not appealed against the sentence.

In Conclusion:

63. I find that this appeal lacks merits. I order that:

1. The sentence be reduced by thirty five days (35) to take into account the period spent in custody while awaiting trial.
2. This appeal is dismissed.



DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JUNE 2024.

L.W. GITARI

JUDGE

