**Langat v Republic (Criminal Appeal 1 of 2019)**
**[2022] KEHC 3338 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3338 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BOMET**

**CRIMINAL APPEAL 1 OF 2019**

**RL KORIR, J**

**JUNE 30, 2022**

**BETWEEN**

**KIPNGENO PHILIP LANGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From Original Conviction and Sentence by Hon. B. Omwansa, PM) in Sotik Principal Magistrate's Court Sexual Offence Number 12 of 2017)***

**JUDGMENT**

1. The Appellant was charged with the offence of Rape contrary to Section 3(1) b as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006, Laws of Kenya. The particulars of the Charge were that on 26th April 2015, at [particulars withheld] market, Sotik Sub- County, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of T.C without her consent.

2. He faced an alternative charge of causing an indecent act with an adult contrary to Section 6(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 26th April 2015, at [particulars withheld] market, Sotik Sub- County, within Bomet County, he intentionally and unlawfully touched the vagina of T. C with his penis, an act which was indecent.

3. The Appellant pleaded not guilty to both charges and the case went to full trial in which the prosecution called fourteen (14) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was accordingly put on his defence. He gave a sworn statement and did not call any witnesses in his defence.

5. At the conclusion of the trial, the Appellant was convicted by Hon. B. Omwansa, Principal Magistrate on the main charge and was fined one hundred thousand Kenya shillings (Kshs 100,000/=) and in default, 10 years' imprisonment. The Appellant was sentenced on 28th December 2018.

6. On 2nd January 2019, the Respondent filed for Revision of the Sentence under Sections 362 and 364 of the *Criminal Procedure Code*.

7. Without proceeding further in this judgment, I make a finding that the fine of Kshs 100,000/= for the offence of rape was an unlawful and illegal sentence which cannot be allowed to stand as it is not provided for in law. This however is the subject of the Ruling in Criminal Revision Number 1 of 2019 and I need not say more in this judgment.

8. Subsequently, the Appellant appealed to this court and raised several grounds of appeal as follows:-

    i. That the learned trial magistrate erred in law and fact in convicting the Appellant against the weight of evidence.

    ii. That the learned trial magistrate erred in law and fact in considering extraneous issues in convicting the Appellant.

    iii. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's defence in its entirety.

    iv. That the learned trial magistrate erred in law and fact in convicting the Appellant on the basis of a judgment which was not well reasoned.

    v. That the learned trial magistrate erred in law and fact in convicting the Appellant without first analysing the evidence presented.

    vi. That the learned trial magistrate erred in law and fact in convicting the Appellant on a defective charge.

    vii. That the learned trial magistrate erred in law and fact in convicting the appellant out of pressure from the complainant.

**The Prosecution/Respondent's Case.**

9. TC testified as PW3. She told the court that on the material day, 26th April 2015, she went out for drinks with a friend and people she later came to know. That they began drinking and eating at [particulars withheld] bar and later on at [particulars withheld] bar. The men that she later came to know and who joined their company were Langat (the Appellant) and Baliach (PW14). PW3 said that they met Engineer Kibet upon arrival at [particulars withheld] bar and they ordered for more alcoholic drinks. That the Appellant poured a drink for her in a glass. She stated that she did not take the drink as she felt like vomiting. That the Appellant offered to take her to the back seat of his motor vehicle to rest. It was her testimony that while in the car, she felt the Appellant removing her shoes and at that point she could hear PW4, Gladys Chepkoech asking what was wrong.

10. PW3 further testified that she lost consciousness and when she woke up, she found herself naked and alone in the motor vehicle. That her legs were outside the motor vehicle and when she felt her private parts, she realized that there was some slippery substance which she concluded was sperms. That she found her clothes under the seat and this was around 2 am. She further testified that she went back to the bar and found the Appellant and PW14 (Cheruiyot Rono Baliach) seated and when she asked the Appellant what he had done, the Appellant kept quiet and shifted to another seat. That he later paid his bill and went to his vehicle in an attempt to leave.

11. PW3 testified that she told the watchman not to open the gate and demanded her phone, which the Appellant immediately gave her. That the watchman escorted her to PW6, Winnie Kipkoech's house where she explained what had happened to her and spent the night there. She returned the following morning to the bar to ascertain what had happened. She met Wesley Kipngetich Too, PW1 who told her that he saw her and the Appellant having sex and that he did not know whether she consented to it or not. It was her further testimony that she later on went to Kaplong Mission Hospital to seek treatment and later recorded her statement.

12. PW3 testified that she was meeting the Appellant for the first time and that the Appellant later on begged for forgiveness.

13. Wesley Kipngetich Too (PW1) who was the barman at [particulars withheld] bar testified that on the material day, at around 11 pm, he saw the complainant, the Appellant and PW12 (Pininah Chepkurui). It was his testimony that all of them appeared drunk but nonetheless ordered for more alcohol. PW1 testified that after a while, the complainant, the Appellant and her friend left for the Appellant's car. That the Appellant and the complainant remained in the vehicle.

14. It was PW1's testimony that he later went to the motor vehicle and found PW3 naked while the Appellant was not naked. That 10 minutes later, the Appellant removed his shirt. It was his testimony that the Appellant's friend PW14, then removed PW3 from the vehicle. He said that he saw the Appellant kissing PW3 and that only he and the watchman witnessed the incident. That she heard PW3 complaining to the watchman that she had been raped.

15. PW1 was later recalled and testified that he did not take any car keys from the table where the Appellant was and that PW14 did not give him Kshs 100/= to purchase a litre of water for PW3.

16. Robert Kibet Tanui (PW2), Gladys Chepkoech (PW4), Winnie Chepkoech (PW6), Richard Kipsang Rono (PW7) and Pininah Chepkurui (PW12) were all at the [particulars withheld] bar. They all saw the Appellant, the complainant and the friends who accompanied them. They all testified that the Appellant and the complainant in the company of their friends indulged in alcohol. It was also their common testimony that they did not witness the alleged rape.

17. Francis Rono (PW5) testified that he was a clinical officer at Sotik Health Centre. That he examined PW3 on 29th April 2015 after she had been treated at Kaplong Hospital. It was his conclusion that there was evidence of penetration. He produced the P3 Form as P.Exhibit 2.

18. No. 61839, CP Amos Gachii Gakure (PW8) testified that he was stationed at DCIO Nairobi, in a unit called Public Complaints. That PW3 had complained that her rape case had been mishandled by the office of the ODPP. It was his evidence that he travelled to Bomet and perused the file number 801/256 and later on interviewed the complainant, PW7 (Richard Kipsang Rono, the bar manager) and PW1 (Wesley Kipngetich Too the bartender). It was his further evidence that they recorded statements from PW1 and the complainant and directed the investigating officer to complete investigations and forward the file to the DCI Headquarters. PW8 further said that PW7 had told him that he only learned of the incident 4 days later and that he attended a meeting between the Appellant and the complainant in which the Appellant pleaded with the complainant to pardon him in exchange for one hundred thousand shillings (Kshs 100,000/=).

19. PW9, Dominic Kiprono was the security guard who testified that on the material day at around 10.30 pm, he opened the gate for a motor vehicle. That after parking the car, the occupants went to the hall to drink until 2-3am. He said that he patrolled the compound and he did not witness anything. It was his testimony that when the Appellant proceeded to leave in the vehicle, PW3 complained that the Appellant had her phone. That she was given her phone and then the vehicle left. It was his further

testimony that he heard the rape allegations from other security guards and not PW3. PW9 testified that they were 3 guards and none of them witnessed the incident.

20. John Kipngetich Rono (PW10) testified that he was a registered clinical officer who worked at Kaplong Mission Hospital. It was his testimony that he examined PW3 on 27th April 2015 and upon examination she appeared confused, traumatized, drowsy and that there were no tears on her private parts. That upon urinalysis and a high vaginal swab, there was less protein, epithelial cells and no spermatozoa. It was his conclusion that there was penetration. PW10 produced the Treatment Notes as P. Exhibit 1.

21. Christabel Baguya (PW11) testified that she was a registered clinical officer at Kaplong Mission Hospital. She testified that the police visited their facility and asked for records to show that the complainant had been treated there. It was her testimony that the patient had been treated by John Rono (PW10) and she produced a report dated 13th May 2015 marked as P. Exh. 3. In summary, the report indicated that upon examination of PW3, numerous epithelial cells were seen. It was also found that no spermatozoa was seen. It was the report's conclusion that the complainant had suffered sexual assault or rape.

22. No. 101719 PC Susy Wangila (PW13) testified that she was the Investigating Officer in this matter. That she was assigned to investigate the matter on 28th April 2015. It was her testimony that she interrogated PW3 who told her what had happened and which accords with PW3's testimony as already outlined. That on 13th May 2015, she visited Kaplong Mission Hospital where she obtained certified medical treatment notes. It was her testimony that she was later transferred from the station.

23. Cheruiyot Rono Baliach (PW14) testified that the Appellant was his friend and colleague at work. That on the material day, they were joined by PW3 and another lady at [particulars withheld] bar. That they took alcoholic drinks at the bar then they left for [particulars withheld] bar. It was his testimony that upon arrival, they met a friend to PW3 and they were invited to the table where Eng. Kibet was seated and they ordered for drinks.

24. It was PW14's testimony that PW3 requested to go out as she appeared to be vomiting. That at that point, the Appellant got hold of her and they went out where they stayed for over 40 minutes. It was his testimony that when the Appellant was asked where the complainant was, he stated that she was relaxing in the car. PW14 testified that the Appellant later went out and they came back with the complainant.

25. PW14 testified that PW3 came back to the bar while complaining and kept on asking the Appellant why he did what he did to her in public and why he did not use a condom. It was his testimony that he and the Appellant paid their bill and as they were leaving, PW3 went to the watchman and told him that she had been messed up and that she had been raped.

26. PW14 denied that he neither took the Appellant's car keys nor purchased a litre of water for PW3. He testified that the Appellant went out of the bar and stayed for close to an hour and at that time, PW3 was also outside. He further testified that he was not interested in PW3.

**The Defence Case**

27. The Appellant testified as DW1. He testified that on the material day, he was with PW14 and 6 Members of the County Assembly. It was his case that they drove to Kaplong to have lunch. That he then called Grace Cherotich and proceeded to Kaplong [particulars withheld] bar where they ordered nyama choma. It was his submission that PW14 requested for some company and after a while, a lady

called Chela (PW3) came. It was his further testimony that PW3 did not eat the meat but consumed 6 bottles of Tusker within 30-45 minutes.

28. It was the Appellant's testimony that PW14 offered to pay the bill and thereafter, they left for [particulars withheld] bar. That when they entered the bar, one Kibet came and greeted PW3 and shared pleasantries. It was the Appellant's further testimony that PW3 ordered for Gilbeys. That she also knew the counterman who had served them.

29. The Appellant testified that Kibet bought another round of Gilbeys for PW3 and Tusker for them. That at this point, PW3 complained that she was tired and drunk and that she wanted to rest. That PW14 suggested that she rests in the car and the Appellant obliged and escorted her to the car.

30. The Appellant testified that after 3 minutes, the counterman (PW1) came back and said that PW3 needed water. That PW14 gave PW1 Kshs 100/= to buy water. It was his testimony that after an hour, PW3 came back to the bar and suggested to PW14 that they sleep in some room upstairs. That when PW14 refused, PW3 told the Appellant that he was spoiling her business. That he was not her boss at the bar even if he was a boss at the County Government. It was his testimony that PW3 complained that her intention was to make money and that had it not been for them, she would have made more money. The Appellant said that he paid a bill of Kshs 3000/= and they went to the parking lot. That PW14 and PW3 were talking before they left.

31. It was the Appellant's testimony that he had a driver and when they wanted to leave, PW3 told the watchman not to open the gate as her phone had been stolen. That his driver gave PW3 her phone. The Appellant testified that as the gate was being opened, PW3 shouted, "nyinyi ni wajinga sana" (You are fools). That there was a confrontation with PW3 and thereafter they left for Bomet.

32. The Appellant testified that Ivy called him complaining, "mbona mliacha rafiki yangu hivo, hata hakumpatia hata elfu moja" (why did you leave my friend in that state, without giving her even one thousand shillings). That later somebody who identified himself as the manager of the [particulars withheld] bar called him to inform him that the girl was dangerous and that she could report them. It was his testimony that people called his driver asking for money to settle an issue. It was his further testimony that Omondi, a CID officer from Sotik called him asking for Kshs 200,000/= to resolve the issue so that he could not lose his job.

33. The Appellant further stated that Ivy and his driver never recorded any statements. That from where they parked their car, no one could see the counter. It was his further testimony that PW1 went out twice, accompanied PW3 and took water to her. That he saw 3 watchmen and the only complaint the guard raised against him was about the phone. He said that there were cottages near the parking area and that they were occupied. That the complainant was already drunk after she took 8 Tusker Malts and a 750 ml of Gilbeys and that he did not go to the car with her.

34. Finally, the Appellant testified that he neither raped PW3 nor touched her private parts with his penis. That in 2017, he was informed that his case was being assembled.

35. As a first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial. This duty was succinctly stated by the Court of Appeal in *Okeno v Republic* 1972] EA 32 as follows: -

> " An appellant 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 weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

36. The Appeal was canvassed through written submissions. The Appellant's submissions are dated 8th May 2020, while the Respondent's is dated 15th March 2021.

**The Appellant's Submissions**

37. The Appellant submitted that the charge was defective and that the prosecution did not prove lack of consent which was a vital ingredient in rape cases. That according to PW1's testimony, he and the complainant were sitting in the car and kissing before they had sexual intercourse. He also submitted that the Prosecution failed to show any force, threats or intimidation of any kind from the Appellant. It was his further testimony that from PW1's evidence, the complainant did not protest during the incident inside the car. The Appellant relied on the cases of *Charles Ndirangu Kibue v Republic* [2016] eKLR and *Republic v Francis Otieno Oyier* [1984] eKLR to support his submissions.

38. The Appellant submitted that the trial court was misled in recalling PW1 to testify. That at no point in the defence hearing did the defence witness adduce fresh evidence and that recalling of PW1 was a ploy to respond to contradictory evidence and by extension cure the defects in the prosecution case. He relied on the case of *Stephen Mburu Kinyua v Republic* [2016] eKLR to support his submission.

39. The Appellant submitted that the guilt of an accused person must be proved beyond reasonable doubt. It was his submission that the prosecution case was riddled with glaring inconsistencies and contradictions that ought to be resolved in his favour and he relied on the cases of *DMM v Republic* [2019] eKLR, *Cyrus Maina Gakuru v Republic* [2016] eKLR, *Francis Kimani Karanja v Republic* [2016] eKLR and *Patrick Mwangi Waweru v Republic* [2016] eKLR to support his submissions.

40. It was the Appellant's conclusion that the trial court erred in convicting him on contradictory evidence and by allowing the prosecution to recall its witness contrary to the elements in *Stephen Mburu Kinyua* (Supra).

**The Respondent's Submissions**

41. The Respondent submitted that it was clear from the Record and the testimony of the Prosecution witnesses that the Appellant raped the victim in his car after having drinks with other friends. They further submitted that their case was tied on direct and circumstantial evidence. That the testimony of the 13 witnesses corroborated the victim's account.

42. The Prosecution submitted that the Charge Sheet was not defective as the particulars section was in a clear language and without ambiguity. They further submitted that the Charge Sheet met the test set out under Section 134 of the *Criminal Procedure Code*. They relied on the case of *Isaac Omambia v Republic* [1995] eKLR to support their submission.

43. It was the Prosecution's submission that penetration was proved as PW10 examined the complainant within 24 hours and confirmed that penetration had occurred. That the same was fortified by a medical report that was produced by PW5 who conducted further examination immediately after the incident. It was their further submission that the element of penetration had been proved to the required standard as defined in Section 2 of the *Sexual Offences Act*.

44. With regard to identification, the Respondent submitted that the ordeal happened at night and the Appellant and the complainant had spent quite some time together on the material day. That it was further established by PW1-PW4 that the Appellant was the only person who left the premises with

the victim. The Prosecution submitted that the Appellant placed himself at the scene but denied committing the act.

45. The Respondent submitted that although the victim could not state clearly if she saw the Appellant commit the offence, there was enough circumstantial evidence that indicated that it was only the Appellant who committed the offence. That the Appellant bore the burden to satisfactorily explain his movements on the material day. They relied on the case of *Omar Mzungu Chimera v Republic* Criminal Appeal No. 56 OF 1998, to support their submission. It was the Prosecution's submission that the Appellant failed to discharge the burden contemplated in Section 111 (1) of the *Evidence Act*.

46. With regard to Sentencing, the Respondent submitted that the guiding principles were laid out in the case of *Wanjema v Republic* (1971) E.A 494. They further submitted that in this case, the law contemplated a minimum of 10 years' imprisonment although this would be read vis-a-vis the Supreme Court decision in the case of *Francis Karioko Muruatetu & Another v Republic*, S.C. Petition Number 16 of 2015 which outlawed mandatory sentences.

47. The Respondent submitted that it was evident on Record that the trial court considered the circumstances in which the offence was committed, the Appellant's mitigation and his status as a first offender before meting the Sentence. That however, besides the Sentence being unlawful, the trial court failed to consider the nature or seriousness of the offence and the aggravating circumstances as the Appellant took advantage of an intoxicated lady who qualified as a vulnerable victim in need of care and protection. That the Appellant raped her and robbed her of her dignity. The Respondent further submitted that this court should interfere with the Sentence of the lower court and impose a custodial one as contemplated by the law.

**Issues for Determination**

48. From my perusal of the Record and consideration of the Petition of Appeal dated 10th January 2019, the Appellant's submissions dated 8th May 2020 and the Respondent's submissions dated 15th March 2021, I discern four issues for my determination as follows: -

    i. Whether the charges were defective.

    ii. Whether the trial court overstepped its mandate contrary to the provisions of Section 150 and 212 of the Criminal Procedure Code.

    iii. Whether the Prosecution proved its case.

    iv. Whether the Sentence was lawful.

**Analysis**

**i. Whether the charges were defective**

49. The charge in the Charge Sheet was rape contrary to Section 3 (1) (b) as read with Section 3 (3) of the *Sexual Offences Act*, No. 3 of 2006 and the alternative charge was causing an indecent act contrary to Section 6 (a) of the *Sexual Offences Act*.

50. At the very onset, it is essential to discuss the issue of the defectiveness of the Charge Sheet which the Appellant had raised as ground 6 in his Appeal. The law on Charge Sheets is anchored in Section 134 of the *Evidence Act* which states:

> " 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."

51. The particulars were well drafted in the English language which the Appellant understood. The same were read and interpreted to the Appellant to which he pleaded not guilty to both counts. It is my finding therefore that the Charge Sheet was proper. It contained sufficient particulars to inform the Appellant of the charges that he faced. I therefore hasten to dismiss ground 6 of the Appeal as it has no merit at all.

**ii.Whether the trial court overstepped its mandate contrary to the provisions of Section 150 and 212 of the Criminal Procedure Code.**

52. At the close of the Defence case, the Respondent (Prosecution) made an Application under sections 150 and 212 of the *Criminal Procedure Code* to have PW1 and PW14 recalled to substantiate the new evidence adduced by the Appellant in his case. The trial Magistrate allowed the Application in the interest of justice under Article 50 (2) (b) (c) and (i). The trial court further stated that the Appellant did not suffer any prejudice as both witnesses were sufficiently cross examined.

53. The Appellant submitted in his Appeal that the recalling of PW1 and PW14 prejudiced him in the trial as the two witnesses were recalled to plug the Prosecution case.

54. It is my finding that the trial court did not overstep its mandate according to Sections 150 and 212 of the *Criminal Procedure Code*. Further, looking at the evidence closely, it is my view that no new evidence was introduced when the two witnesses were recalled and no prejudice was suffered by any party by the recall of the two witnesses as the parties were accorded the opportunity to cross-examine them.

**iii.Whether the Prosecution proved its case.**

55. Grounds I, II, IV V, VI and VII all address the issue of whether or not the evidence before the trial court proved the charge to the required legal standard. A careful analysis of the evidence is therefore necessary. The Appellant was charged under Section 3 of the *Sexual Offences Act* which provides: -

    1. (b) a person commits the offence termed rape if the other person does not consent to the penetration.

    3. a person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

56. For the offence of rape to be established, the following elements must be demonstrated: -

    i. The intentional and unlawful penetration of the genital organ of a person by another.

    ii. The absence of consent.

    iii. Where consent is obtained by force or by means of threat or by intimidation of any kind.

    Further, it goes without saying that there must be positive identification of the perpetrator.

57. Looking at the evidence of penetration, the general rule is that even without considering the presence of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position was fortified by the holding of the Court of Appeal in *Martin*

*Nyongesa Wanyonyi v Republic* Criminal Appeal No. 661 Of 2010, (Eldoret), citing *Kassim Ali v Republic* Criminal Appeal No. 84 of 2005 (Mombasa) where the court stated thus: -

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."

58. PW3, the complainant testified that on the material day, 26th April 2015, she went out drinking with the Appellant and PW14. That they began their drinking spree at Classic bar before proceeding to VIP bar in the Appellant's car. She stated that she did not take any alcohol but began feeling nausea somewhere between 10pm-11pm. She stated that the Appellant led her to his car and had sexual intercourse with her while she was unconscious. That when she came to, she felt her private parts with her hand and realized that there was some slippery substance which she concluded were sperms. It was her testimony that she went back to the bar to confront the Appellant. She further stated that she returned to the VIP bar the following day and asked PW1 who was the counterman (PW1) what had happened and he responded that he had seen her and the Appellant having sex.

59. In law, the court can convict on the sole evidence of a victim of a sexual offence provided that it records its reasons for believing that the victim was telling the truth. In this case, the trial court did not state in the proceedings why it believed the evidence of the victim. I shall therefore look at the medical evidence for any corroboration.

60. Medical evidence in this case was given by no less than three medics. PW5 being a clinical officer at Sotik Health Centre examined the complainant on 29th April 2015. Upon cross examination, he stated that he relied on the treatment notes from Kaplong Mission Hospital. Additionally, he testified that there were no blood stains and no perennial tears and according to him, those were inconsistent with the offence of rape. It was his opinion nonetheless that there was penetration. He produced a P3 Form that was marked as P.Exh. 2.

61. PW10 being a registered clinical officer testified that he examined the complainant at Kaplong Mission Hospital on 27th April 2015, a day after the alleged rape. It was his opinion that there was penetration owing to the presence of epithelial cells and he produced the treatment notes as P.Exhibit 1. On further cross examination, he testified that he did not expect such results from a person who had been raped. Upon cross examination he stated that he had examined the complainant 18 hours after the alleged incident.

62. PW11 being a registered clinical officer testified that the complainant had been treated at their facility and that she was called upon to do a report, which she produced as P. Exhibit 3. The report confirmed that the complainant had been treated at their facility and supported the findings of PW10. Upon cross examination, she stated that the findings were not connected with rape and that the several epithelial cells were caused by friction.

63. From the above, it is clear that the complainant was first examined at Kaplong Mission Hospital. The first examining officer was John Kipng'etich Romo, (PW10) who stated in the treatment notes that there were no tears on the victim's private parts and that there was no spermatozoa but the presence of epithelial cells as evidenced by the High Vaginal Swab (HVS) test confirmed penetration. While producing P.Exhibit 3, PW11 stated in cross-examination that the findings were not conclusive that there was penetration. The P3 Form (Exhibit 2) was filled by PW5 who examined the complainant at Sotik Health Centre on 29th April 2015. He (PW5) relied on the treatment notes from PW10 to conclude that the complainant was raped. His own observations were that there were no blood stains and perennial tears. When cross-examined on Exhibit 1, PW10 said that he did not expect to see such results from a person who had been raped.

64. My appreciation of the three medical reports raises doubt in my mind. Firstly, the three reports lack internal logic. PW5 clearly states that in filling the P3 Form, he relied on the treatment notes from Kaplong Mission Hospital where the first examination had been conducted by PW10. If PW10 examined the complainant on 27th April 2015, why did he not fill the P3 Form thereafter? PW10 also stated that the examination took place 18 hours after the incident. My conclusion is that the evidence of PW5, PW10 and PW11 totally lacked internal logic and cannot be relied on unless corroborated.

65. It is my conclusion therefore, that the medical evidence was not conclusive. While the medical reports (P-Exh 3) appear to be conclusive, the medics contradicted their reports in cross-examination. They stated that there was penetration but that they did not expect such results from someone who had been raped. They failed to prove beyond reasonable doubt that there was penetration on the material date.

66. With the medical evidence not having conclusively proved penetration, I turn to examine the circumstantial evidence in this case. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal held: -

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R vs. Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
>
> " "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

67. In *R. v Kipkering Arap Koske & Another* [1949] 16 EACA 135, it was held that: -

> " In order to justify circumstantial evidence, the inference of guilt, and the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

68. There was sufficient and uncontested evidence that the Appellant, his friend PW14, a lady called Irene and the complainant began their rendezvous early afternoon at [particulars withheld] bar where after some drinking, changed venue to [particulars withheld] bar where they continued drinking late into the night. It was also not contested that at around 11.00pm, the complainant told the group that she felt nausea and that the Appellant offered to escort her outside to rest in his car. While the complainant testified that the Appellant raped her, the Appellant denied having done so.

69. PW9 (Dominic Kiprono, the guard) was mentioned by PW1 in his testimony as one of the people who had witnessed the incident. PW9 however testified that he only saw the complainant, the Appellant and their friends drink at the bar until 2-3 am. He further stated that he patrolled the compound but did not witness the alleged incident.

70. It was clear from the Record that none of the prosecution witnesses was an eye witness to the act of penetration. The closest evidence was that of PW1 who told the court that he saw the Appellant and the complainant kissing in the Appellant's car. His evidence is however glaringly inconsistent as noted by the trial court.

71. My conclusion therefore is that the circumstantial evidence restated above was too weak to prove penetration. It only proved that the Appellant and the complainant went to the Appellant's car and spent some forty minutes there.

72. I now delve into the issue of inconsistent evidence. In *Joseph Maina Mwangi v Republic*, Nairobi Crimnal Appeal No. 73 of 1992 [2000] eKLR, Tunoi, Lakha & Bosire JJA held: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

73. The trial court noted that the testimony of PW1 was inconsistent. He gave contradictory evidence as on one hand, he could not tell at what point the Appellant and the complainant were in the motor vehicle and at what point they returned to the bar. It is clear from his testimony that he did not witness the alleged incident as he testified that he asked the watchman what the two were doing in the car.

74. PW1 also went on to testify that when he went back outside, he found the complainant's dress in the car, that she was naked but the Appellant was not naked. That later on, the Appellant's friend removed the complainant from the car and at this point she was fully dressed. Upon cross examination, PW1 stated that he witnessed the Appellant and the complainant kiss and have sex but did not see the Appellant remove his trousers. At the same time, he admitted that he could not see the motor vehicle from the counter where he was located but he also stated that he saw the Appellant remove his shirt.

75. The other inconsistent evidence that I find in this case is that of the clinical officers PW5, PW10 and PW11. As already analyzed above, their conclusion was that there was evidence of penetration but their medical findings evidenced by the PEX (1-3) do not tally with these findings. This is an obvious contradiction.

76. The Court of Appeal of Nigeria explained contradictions and discrepancies in the case of *David Ojeabuo v Federal Republic* of Nigeria [2014] LPELR-22555 (CA), as follows: -

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

77. Evidently, the Prosecution witnesses gave contradictory evidence. These were not mere discrepancies as they go to the root of the issues contested herein. In my view, these contradictions are glaring and thus the evidence in this regard is short of the legal threshold for me to arrive at a conviction.

78. As already stated, in a criminal trial, there must be positive identification of the perpetrator. It is trite law that evidence of identification must be carefully scrutinized before a person can be convicted of an offence to avoid a miscarriage of justice. (see Court of Appeal decision in *Eric Odhiambo Okumu v Republic* [2015] eKLR and Cleophas Otieno Wamunga v Republic, 1989 KLR 424).

79. In this case, the incident occurred at night. The guiding principle relating to identification at night was aptly enunciated by the Court of Appeal in the case of *Nzaro v Republic* [1991] KAR 212 where it was held that:

> " Identification/recognition at night must be absolutely watertight to justify conviction".

80. However, the above does not apply in the present case because the Appellant and the complainant had met during the day when they began drinking in the company of friends until late in the night. The only outstanding issue is whether he indeed raped the complainant.

81. I have considered the Appellant's defence. He stated that there were cottages near the parking that were fully occupied and that there were many men and women in the vicinity on the material day. It was his argument that since PW3 was already drunk, she may have been raped by anybody else. The complainant during cross-examination also stated that she did not witness who raped her.

82. I however dismiss the Appellant's suggestion that someone else may have raped the complainant while she was outside. This is because it was the unassailable evidence of the Prosecution witnesses and even his own admission that he escorted her to his car. His own friend PW14 testified that they remained outside for 40 minutes. Besides, it is doubtful that anyone would have trespassed into his car while there were security guards in the parking.

83. On the same breath, I find the Appellant's defence incoherent. On the one hand he denied having had sexual intercourse with the complainant while on the other hand, he challenged the Prosecution (the Respondent) to prove that there was no consent.

84. It is my conclusion that the Appellant and the complainant, while in their drunken state, left their friends in the bar and retreated to the Appellant's car where they may or may not have had sexual intercourse.

85. Lastly, I will address the ingredient of consent which the Appellant raised in challenging the evidence of the Respondent. From my perusal of the Record, the account of events reveals that the Appellant and the complainant alongside their friends had been enjoying each other's company from Classic bar to VIP bar. The complainant in her testimony stated that she willingly joined the Appellant at Classic bar upon her friend Irene's invitation and that they later proceeded to VIP bar where she knew the manager. PW1, PW2, PW4, PW7, PW9 and PW12 all testified that the complainant and the Appellant came to VIP bar when they were already drunk and they continued drinking late into the night.

86. In my analysis of the chain of events, both the Appellant and the complainant were intoxicated. There is no evidence of force, coercion or misrepresentation particularly from the complainant herself. The question here is whether by conduct or expressly, the Appellant and the complainant freely engaged with each other until after the alleged incident, bearing in mind that both of them were drunk. In the Australian case of *R. v Wrigley* 9/2/1995 C.A. Vic, the court held:-

> " A mere impairment of judgement or reduction in inhibitions as a result of alcohol consumption will not negate free agreement."

87. Similarly, in *Chrisantos Otieno Omondi v Republic* [2016] eKLR, when faced with a similar scenario, Kimaru J. stated thus: -

> " .....The events preceding the complainant and the Appellant going to the Appellant's house does not point to the fact that the Appellant had the intention to sexually assault the complainant. Taking into consideration the totality of the evidence adduced, this

court cannot reach a finding that the sexual intercourse between the Appellant and the complainant was not consensual....."

88. I am persuaded by the above decision. My analysis of the prior events and my consideration of the entire evidence leads me to conclude that there was no evidence from the Prosecution to show that the sexual intercourse if any, was not consensual. Consequently, the charge of rape fails.

**iv. Whether the Sentence was lawful**

89. With respect to sentence, the Appellant prayed that the same be reversed, set aside or varied as the trial court convicted him out of the pressure from the complainant. I have already stated early in this Judgement that the Sentence meted on the Appellant was illegal and unlawful. If the conviction stood, I would impose the lawful sentence of 10 years' imprisonment.

90. In the final analysis, it is my finding that the case against the Appellant was not proved to the required legal threshold. The totality of the evidence creates a very strong suspicion that he raped the complainant. In law however, suspicion cannot be a basis for a conviction. In the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court of Appeal held that:

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

91. In the end, the Appeal succeeds. I quash the Conviction. With respect to the Sentence, I set aside the sentence imposed by the trial court and revised by this Court in Criminal Revision No. 1 of 2019. The Appellant is set at liberty forthwith unless otherwise lawfully held.

92. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF JUNE, 2022.**

**.....**

**R. LAGAT-KORIR**

**JUDGE**

**Judgment delivered in the presence of Mr. Muriithi for the State, and Kiprotich (Court Assistant) and in the absence of the Appellant and his Counsel.**