REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 58 OF 2017

BETWEEN

WYCLIFFE SHAKWILA MUNGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable V Yator-RM

dated 23rd January, 2017 in Mombasa Criminal Case No. 64 of 2015)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

WYCLIFFE SHAKWILA MUNGO.....ACCUSED

JUDGEMENT

1. The appellant, **Wycliffe Shakwila Mungo**, was charged in the Chief Magistrate's Court at Mombasa in Criminal Case No. 64 of 2015 with the offence of rape contrary to section 3(1) and (2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the offence were that the appellant, on the 8th December, 2015 at [Particulars Withheld] Area in Changamwe subcounty within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of **AMZ** aged 21 years old.

2. After hearing, the Learned Trial Magistrate found that the prosecution proved its case beyond reasonable doubt that the appellant had committed the offence with which he was charged, convicted him of the same and sentenced him to serve 15 years imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

1. THAT the learned trial magistrate erred in law and fact in convicting the appellant considering that the charge sheet relied upon was defective and was not credible to warrant a conviction.

2. THAT the learned trial magistrate erred in law and fact in convicting the appellant considering that the burden of proof was not established beyond reasonable doubt as there was no credible evidence tendered by the complainant that incriminated the appellant.

3. THAT the learned trial magistrate erred in law and fact in convicting the appellant without considering that the prosecution evidence that was adduced in court had massive contradictions and variances which did not reconcile and corroborate the charge sheet thus contravening section 153 as read together with section 154 of the Criminal Procedure

Code.

4. THAT the learned trial magistrate erred in law and fact in convicting the appellant without considering that the key witnesses who were mentioned and subsequently put in the committal proceedings were never compelled to testify in court so as to clear the doubt upon the prosecution evidence thus contravening section 144 as read together with section 150 of the Criminal procedure Code.

5. THAT the learned trial magistrate erred in law and fact in convicting the appellant without considering that there was a grudge that existed between the appellant and PW2, PW3 over the issue of accused's first wife thus contravening section 212 as read with section 235 of the Criminal Procedure Code.

4. At the hearing of the case the prosecution called five witnesses.

5. PW1, **AMZ**, the complainant herein testified that she was aged 21 years having been born on 15th June, 1994. According to her on 8th December, 2015 at around 7.00 am she was from home going to work and as she was heading towards the bus stage, she saw the appellant walking behind her while talking on phone. After finishing his conversation the appellant caught up with her and asked her where she was working and upon disclosing that she was working at [Particulars Withheld], Changamwe Branch, the appellant informed her that there was a lady they had employed there and wanted to show the complainant the photo but the complainant refused. The appellant then informed her that their office situated at HSSF Building was in need of a secretary and informed the complainant that they would train her in those duties. Thereafter the appellant received a call and informed the caller that he had gotten somebody. The appellant then asked the complainant that they should proceed there immediately but the complainant informed him that she had to report to work and gave the appellant her number which the appellant flashed and informed her that his name was Festus and the complainant saved it.

6. At 5.00 pm the appellant called her and informed her that he was still at work and the complainant called her father and requested that he brings to her, her certificates at the stage where they had agreed to meet with the appellant. Upon arriving at the stage, she found the appellant who informed her that they were waiting for her but the complainant informed him that she would not go alone. Thereafter the complainant met her two sisters who had brought her certificates and she decided to go with one of them. The three of them then walked heading towards Kona Reli KTDA across a large field where they met a man whom they asked whether there was a way and the man showed them the way.

7. Although the appellant tried to convince the complainant's sister to remain behind, the complainant refused saying it was not safe and they continued towards some houses. The complainant then asked her sister to remain behind since the appellant said that young children were not permitted. The appellant then asked someone on the phone which gate they were using and they went back and upon reaching a place that had heaped sand on the way, the appellant pushed her and as she struggled to stand up, pulled her down and sat on her back when she tried to scream and strangled her. He then pulled the bottom of her dress, removed her dress turned her and raped her twice after which he ordered her to dress while threatening that he would kill her and bury her in the sand. He then ordered her to inform her mother that she was still signing the documents in the office which the complainant did. When her sister called the appellant the appellant gave her the same information.

8. After that the appellant demanded that she gives him Kshs 500.00 or he would kill her and the complainant gave him Kshs 400.00 which was in her bag and upon failing to get money from her Mpesa. On their way out, the appellant told her to go get her sister but she informed him that that was not the way they used and upon asking the appellant for fare the appellant gave her Kshs 100 and handed back her phone.

9. The complainant then ran to where her sister was while in pain as she had been injured on her knees and hands and they boarded a *matatu* and headed home where she narrated what had happened to her. The following day she went to Coast general Hospital where she was referred to Gender Section where she was tested and put on medication for one month and was advised to report to the police. She was also issued with p3 form which was filled in as well as the PRC form.

10. After that the appellant started calling her but she declined to pick his calls and wrote to her a text message threatening her that she would cease to exist for the next two years. One time he even called her telling her that she was HIV positive and asked her to go and see him in order to get medicine for HIV but she declined to do so. After one month, the complainant went back to the Hospital and she was found to be HIV negative.

11. On 18th December, 2015 the appellant again called her using phone number 0704084248 at 3 pm alleging that he was a director of a company which the appellant had mentioned seeking to know if she still needed a job and the complainants requested for his contacts at which point he sent the appellant's number. However when the complainant called him he did not pick. But when the complainant text him, he called back and told her to call him when from work so that he could take her to the director. The complainant then relayed this information to the investigating officer. The complainant then agreed to meet with the appellant at Miritini Stage and she was given two police officers and they drove there. She then alighted while the officers watched from a far and upon informing the appellant that she was at Miritini Stage the appellant informed her to wait for him and shortly thereafter the appellant appeared and asked that the board a *matatu* but the complainant lied to him that she wanted to buy some fruits at which point she went to a nearby grocery and called the police officers who arrested the appellant when the appellant followed her and took him to the police station.

12. According to the complainant before the incident she did not know the appellant.

13. PW2, **NMZ**, testified that she was 16 years old having been born in 1990 and that PW1 was her sister. On 8th December, 2015 at around 7pm she was given PW1's certificates by her father to take to PW1 to the Stage. In the company of her younger sister they left and on their way they met PW1 and the younger sister went back home. Shortly PW1 called some body and the appellant appeared, greeted them and introduced himself as a teacher. As they continued walking the appellant asked her if she knew of a girl called **Christine Mwende** but PW2 denied knowing her. The appellant then disclosed that he had secured for her employment at the Airport. They continued walking till they

reached Mantali where the appellant decided that they use a shortcut. After crossing a river, the appellant asked PW1 that PW2 should wait for them there but PW1 refused saying the place was unsafe. Upon approaching some houses, they left her there and they went through the route they had come from. After one hour PW2 got worried and shortly thereafter saw PW1 coming crying and informed her that the appellant had raped her. According to her PW1 had a swollen face and bruises on her hands and knees. They then went home and disclosed the incident to their parents. The following day PW1 went to the hospital. That same day, the appellant interacted with PW2 for about one hour. PW2 identified the appellant and the pink dress that PW1 was wearing that day. According to her she had nothing against the appellant. She however did not witness the appellant raping PW1.

14. PW3, **Dr Samira Oswan**, a medical officer based at Coast general Hospital testified that she was in possession of a post rape care form prepared by **Dr Zeyana Ressul**, with whom she worked for about one year and was familiar with her handwriting and signature. According to her the said form was filled on 9th December, 2015 at the hospital and the same belonged to PW1 who was born on 15th June, 1994. According to the report, PW1 was in a relationship and the last time she had consensual sex was on 5th December, 2015. However, the incident in question took place on 8th December, 2012 at Miritini and the complaint was rape and other injuries. According to PW3, on examination PW1 had multiple bruises on the face, on the neck, shoulder, knees and lacerations on the upper lip. On examination of her genitalia PW1 had a whitish discharge and had fresh laceration and red spots of blood under the skin as a result of trauma and injury. It was however noted that the hymen was broken and there was an old scar. The victim had taken bath and had changed clothes and was put on medication and tests for HIV, VDRC and hepatitis done. Vaginal swab revealed pus cells but no spermatozoa were seen. According to PW3, spermatozoa can die within few hours. According to him, in cases of consensual sex there will be no laceration and scars hence the sexual act was forceful in nature. PW3 then produced the PRC form and the lad tests results.

15. In cross examination, PW3 stated that the fact that she had sex on 5th December, 2015 does not mean that she was not raped on 8th December, 2015.

16. PW4, **Dr Uba Abdulkarin Hemed**, of Coast general Hospital was the one who filed the P3 form for PW1. According to him, at the time of the examination PW1 had changed clothes her general physical examination was good. She however had bruises on her left shoulder and knees and lacerations on her upper lip and neck. According to him the approximate age of the injuries was five days. PW1 was given post exposure prophylaxis for prevention of HIV and antibiotics for infections. According to him the probable type of weapon was blunt object and the degree of injury was assessed as maim. She also had lacerations on her vagina, with whitish discharge and her hymen was not intact.

17. It was further his evidence that investigations for syphilis and Hepatitis were negative. In his evidence the injuries revealed that PW1 was raped. According to him for consensual lacerations were not expected and whitish discharge is normal for a female person. It was his opinion that a victim of sexual assault should go to the hospital immediately. According to him, it is necessary that the perpetrator he examined if found. It was his evidence that the penis is a blunt object.

18. PW5, **Sgt Regina Kyule**, was the investigation officer and on 9th December, 2015 was on duty when she came across a case pf rape in the occurrence book in respect of PW1. She then commenced investigations by calling PW1 who narrated to her what had happened. After that she escorted PW1 to the hospital where she was tested and discharged after being issued with a p3 form which was filled in. Thereafter they started searching for the appellant who was finally arrested and taken to Changamwe Police Station where he was charged with the offence before the court.

19. In cross examination she confirmed that PW1 reported the incident on 8th December, 2015 and in her report she stated that she had been raped by one **Festus**. However PW5 confirmed that the name was not correct and that she later confirmed the appellant's names as **Wycliffe Shakila Mungo**. It was her evidence that the appellant was arrested at the mainland when the appellant was walking after being identified by PW1. According to her the appellant was communicating with PW1 though she did not have the phone which the appellant was using. According to her no exhibits were taken to the station and she was not aware if any clothes were taken to the station. In her view since PW1 was an adult there was no need to call her parents.

20. The appellant gave sworn testimony in which he testified that he was a teacher at Seaside Girls High School and that his name was not Festus. It was his evidence that on 8th December, 2015 he was not in Mombasa as he had boarded Tamheed Bus heading to Kisumu for the graduation of his brother Allan Mukani Mungo at Maseno University. According to him the bust left between 4pm and 4.30 pm and that he arrived in Kisumu at around 6am while the graduation was to be held on 9th December, 2015. From the graduation, he went to his home in Kakamega for the celebrations and thereafter returned on 15th December. 2015 arriving in Mombasa at 5am on 16th December, 2015. Because he was on duty at the school, he went to school and between 4pm and 5pm he left. At Changamwe roundabout he was called by 2 men who informed him that they were police officers and one of them presented a job card and he was informed that a report had been made at Changamwe Police Station and he was required to record a statement. He was then taken to the police station where he was placed in the cells. Later he was removed from the cells and taken to the report office where he informed the police who he was after which he was taken back to the cells after being informed of the charges facing him.

21. The following days after his fingerprints were taken he was taken to Court 3 where the charges were read to him which he denied and informed the Court that he was not in Mombasa when the incident happened. It was his case that he was not Festus and that he had not committed the offence. He produced a copy of his ID as exhibit.

22. He was however not examined by the prosecutor.

23. In her judgement the Learned Trial magistrate found that for an offence of rape to be proven, the prosecution needs to prove penetration, that sex was not consensual and that the assailant was positively identified. It was her finding based on the medical documents that that penetration was proved. As regards proof that sext was non-consensual, it was her finding that based on the evidence of PW1 and the injuries sustained by herself on her body as well as in her genitalia, the prosecution proved beyond reasonable doubt that the sex was not consensual. As to the identification the assailant, it was her finding that based on the evidence of PW1 and PW2, there was no room for mistaken identity. It was the finding of the court that the tickets produced by the appellant were an afterthought as they were not serialised. The court

therefore found that the prosecution's case had been proved beyond reasonable doubt.

Determination

24. I have considered the material placed before the Court. This is a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

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

25. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus;

> **1. 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 weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

26. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

27. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
>
> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

28. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

29. Under section 3(1) of the ***Sexual Offences Act***:

> ***"A person commits the offence termed rape if-***
>
> ***a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;***
>
> ***b. The other person does not consent to the penetration; or***
>
> ***c. The consent is obtained by force or by means of threats or intimidation of any kind."***

30. The ingredients of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In **Republic vs. Oyier (1985) KLR pg 353**, the Court of Appeal held as follows:-

1. "The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

31. The first issue for determination therefore is whether there was an intentional and unlawful penetration of the genital organ of PW1. In her evidence PW1 narrated how she was sexually assaulted. According to the P3 form, upon being examined by **Dr Zeyana Ressul** who prepared the post rape care form (PRC) on 9th December, 2015, PW1 had multiple bruises on the face, on the neck, shoulder, knees and lacerations on the upper lip. She had a whitish discharge and had fresh laceration and red spots of blood under the skin as a result of trauma and injury. It was however noted that the hymen was broken and there was an old scar. However, vaginal swab revealed pus cells but no spermatozoa were seen. It was however PW3's opinion that spermatozoa can die within few hours and that in cases of consensual sex there will be no laceration and scars hence the sexual act was forceful in nature. It is therefore clear that there was sufficient evidence of penetration. However going by the evidence of PW3 that in cases of consensual sex there will be no laceration and scars, and as in this case the scar was found to have been an old one, and as the examination was conducted one day after the incident, two possibilities can be drawn. The first is that there was an earlier forceful sexual act as sexual intercourse a day earlier could not possibly have given rise to a scar as opposed to a wound. Or the opinion of the doctor that in matters of consensual sexual intercourse there cannot be scars was not entirely correct.

32. The second issue for determination is whether that sexual intercourse was consensual. In my view, the injuries sustained by PW1 cannot possibly be said to have been sustained in the course of a consensual sexual contact. They were more compatible with a non-consensual sexual contact. Accordingly, I find that the sexual contact was not consensual.

33. Was it the appellant that had sexual intercourse with PW1? The only evidence linking the appellant with the act was that of PW1 and to an extent PW2. According to PW2, on 8th December, 2015 at around 7pm she was given PW1's certificates by her father to take to PW1. It would therefore follow that the contact between PW2 and the appellant must have taken place after 7.00pm. It was not stated that PW2 had met the appellant any other time before that day. It must therefore be presumed that this was the first time that the two were meeting just as was the meeting between the appellant and PW1. It was therefore not a question of recognition but identification. The approach on issues of identification was emphasized in the case of **Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001** (UR) where the Court of Appeal stated:

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:

"…….It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

34. In this case there was a failure by the investigators and the prosecution to elicit this information from PW2. In **R –vs- Turnbull and others (1976) 3 All ER 549**, **Lord Widgery C.J**. had this to say:-

"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

35. In this case all the questions posed in the above case as regards PW2 remained unanswered. It is therefore my view that the Learned Trial Magistrate ought to have treated the evidence of PW2 as respects the identification of the appellant with the greatest care.

36. As regards the evidence of PW1, she testified that they met after 5pm. Before this however, the two had met in the morning. Therefore the meeting at 5pm was more in the nature of recognition than identification. In **Peter Musau Mwanzia vs. Republic [2008] eKLR**, the

Court of Appeal expressed itself as follows:

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."**

37. However as was held in **R vs. Turnbull (1976) 3 All E.R 549**:

> **"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

38. In this case according to PW1, she had exchanged contacts with the appellant in the morning. At 5pm the appellant called her again. Had the existence of these calls been proven, there would have been very little if any doubt in concluding that there was in fact communication between the appellant and PW1. However, as the appellant denied any such communication, it was upon the prosecution to prove the same. In that event nothing would have been easier than for the prosecution to produce the call logs, either from the appellant or PW1 showing that the two were in communication. No such evidence was produced.

39. In my view the investigators and the prosecution ought to have investigated the source of the calls allegedly made to PW1 in light of the fact that the name disclosed by PW1 as that of the appellant was denied by him and PW5 in fact confirmed that that name was not correct. In my view where a report of a commission of crime is reported to the police, thorough investigations ought to be undertaken not just with a view to eliciting evidence favourable to the complainant but also evidence if any favourable to the suspect. In other words investigations ought to be independently and impartially conducted and any evidence unearthed, whether favourable to the prosecution or not must be disclosed. This is my understanding of the case of **Bukenya & Others vs. Uganda [1972] EA 549,** where the Court held that:-

> **"prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent."**

40. In **Nguku vs. Republic [1985] eKLR** it was held that:

> **"After considering the case of Kingi v Republic, and Bukenya & Others v Uganda, both appearing in 1972 volume of the East African Law Reports at pages 280 and 549 respectively, we accept that the presumption that the evidence, if produced, would be unfavourable to the party concerned is not confined to oral testimony, but can also apply to evidence of a tape recording which is withheld…In the instant case C/I Lutubula said the tape would have been of little use because of the noise from the juke box in the Wayside Bar. Nevertheless it should, in our view, have been produced and played to the court or, at the very least, offered to the defence for them to do so, if only to show that it was unintelligible."**

41. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes."**

42. Therefore the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered is not necessarily fatal to the prosecution. However, where exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

43. As regards the appellant's alibi, it is trite that the onus is on the prosecution to displace the same after the defence raises it at the trial. The Court of Appeal in the case of **Wangombe vs. Republic [1980] KLR 149** held *inter alia* as follows:

> **"The defence of alibi was put forward for the first time some months after the robbery when the appellant made his**

unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."

44. In **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal stated thus:

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

45. In her judgement, the Learned Trial Magistrate stated that the accused produced some bus tickets raising the defence of alibi. However the court noted that the appellant did not raise this defence during the cross examination of any of the prosecution witnesses. The said defence was therefore treated as an afterthought and was untrue. It is however clear that on 6th July, 2016, the appellant indicated that he had receipts showing that he was not at the place where the offence was alleged to have been committed. I have however perused the typed proceedings and it would seem that the issue of the tickets was wholly omitted from the appellant's defence. However the judgement clearly shows that those tickets were produced. In my view the Trial Court ought to have tested the appellant's defence of alibi and weighed it with all the other evidence to see if the accused's guilt was established beyond reasonable doubt. However this was not done with the Trial Court simply waiving it aside with the comments that it was an afterthought erroneously stating that it was not raised during cross examination by the appellant. It is noteworthy that authenticity of the said tickets was not challenged even in cross-examination as the appellant was never cross-examined in his evidence. I have dealt with this omission elsewhere in my judgement. In my view what is required of the defence is that the defence of alibi be raised at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought. In **R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court by holding that:

> **"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".**

46. In my view there is no particular formula for raising the defence as long as the prosecution and the investigators are put on notice that the defence is likely to be raised so that they can investigate the matter further. It was therefore held in **Festo Androa Asenua vs. Uganda, Cr. App. No. 1 of 1998** the Court made the following:

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

47. In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** where the Nigerian case of **Ozaki & Another vs. The State** was relied, it was held that:

> **"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible…"**

48. It was therefore held in the case of ***Adedeji vs. The State* [1971] 1All N.L.R 75** it was held that:

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

49. The South African case of **Ricky Ganda vs. The State, [2012] ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held:-

> **"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."**

50. With due respect the manner in which the appellant's alibi defence was treated was too casual. While the judgement clearly states that the appellant produced his bus tickets, the body of his evidence does not disclose this at all. This was a very crucial piece of evidence that ought not to have escaped the attention of the trial court when recording the evidence. Further, the same was dismissed offhand as being an afterthought without considering the same alongside the prosecution evidence. To make matters worse, the appellant gave sworn testimony but was not even cross-examined on the same. This was the position in **Macharia vs. Republic [1976] KLR 209** where **Kneller & Platt, JJ** held that:

"Neither of the appellants' statements on oath was tested in cross-examination, which means that the Republic did not challenge it. The magistrate did not touch on this. He did not accept it as true or have any reasonable doubt that it was untrue. We are satisfied that the prosecutor before the magistrate forgot, or did not know, that if the defendant elects to make a statement on oath in his defence he is to be cross-examined on it if it is different from the case for the prosecution and the court may believe the defence or declare that it raises reasonable doubt if it is not so challenged. The unchallenged evidence of each appellant was, however, in the circumstances, clearly untrue and could not raise any doubt about the truth of the girls' stories in view of all the evidence as a whole, including that of the policeman who caught them all in twos in two separate coaches in a railway siding, the reports by the doctor and the analyst, and that of the mothers of the two girls. The failure by the prosecutor to cross-examine and challenge the appellants' denials on oath in this case is not fatal to the conviction. We hope, in future, that the magistrates will ask a prosecutor who does not cross-examine a defendant on his sworn defence statement, if it is different in any material respect from the prosecution case, whether or not the prosecutor's instructions are that the defence is, or might be, true and exculpatory; and if the prosecutor says that they are not so, the magistrate should advise him to cross-examine and challenge it. The defendant has selected this way of making his defence knowing that he might be challenged with searching questions from the prosecutor designed to reveal to the court whether or not the defence is true or results in the prosecution's case failure to prove beyond reasonable doubt the defendant was guilty of the offence charged or any other one open to it on the relevant facts adduced and the law."

51. Apart from this in her evidence PW1 marked the PRC form, P3 form, lab tests results and her dress for identification. While the PRC form, lab results were properly produced as exhibits by PW3, when it came to the P3 form, PW4 only indicated an intention to produce the same. There is nowhere indicated that it was in fact produced by him. Similarly the dress that was marked was never produced as an exhibit with PW5, the investigating officer saying that she was not aware if the clothes were brought to the station. In **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** it was held that:

"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

52. In criminal cases the burden is upon the prosecution to prove all the ingredients of the offence charged beyond reasonable doubt. It was therefore held by the Supreme Court of Canada in **R vs. Lifchus [1997] 3 SCR 320** held that:

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. *Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.* On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt." [Emphasis added].

53. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."

54. More often than not the Court may have some gut feelings as regards the guilt of the accused. However, in the absence of concrete evidence, the Court must give the benefit of doubt to the accused. It must be noted that an acquittal is just a presumption of innocence and what it means is that the prosecution has failed to discharge its burden of proving that the accused is guilty to the required standards, beyond reasonable doubt. It does not necessarily mean that the Court has found that the accused did not commit the offence.

55. In this case had proper investigations been done, evidence would have been unearthed that would have either proved the appellant guilty or would have exonerated him. However, that was not the case. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR**:

"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."

56. In this case, the manner in which the investigations were conducted coupled with the failure by the trial court to properly address itself to the alibi defence raised by the appellant leads me to the inescapable conclusion that the appellant's conviction was unsafe. The alibi defence by the appellant ought to have been sufficiently dealt with considering the fact that the offence was allegedly committed on 8th December, 2015 and it was not until 18th December, 2015 that the appellant was arrested yet the complainant knew the telephone contacts of her

assailant through which it would have been easier for the investigators to trace him. Instead of swinging into action immediately the report was made, it seems that the investigators left it to the complainant to trace the assailant herself and only assisted in the arrest. In my view the offence in question was a serious offence that ought not to have treated in such a casual manner by the law enforcement agencies. By so doing, they lost crucial grounds which would have enabled them to tighten the case against the assailant. Gender based sexual offences in my view, being traumatizing in nature should be treated with the seriousness they deserve by those who are tasked with investigating the same.

57. Regrettably, the manner in which this particular case was treated does not inspire much faith in the administration of justice both to the complainant and the appellant.

58. Accordingly, as the law gives the benefit of doubt to an accused person, this appeal succeeds, the appellant's conviction is hereby set aside, the sentence quashed and I direct that he be set at liberty unless otherwise lawfully held.

59. It is so ordered.

60. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Mombasa this 20th day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Ogweno for the Respondent

CA Lavender