



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 58 OF 2014**

**Cyrus Maina Gakuru.....Appellant**

**Versus**

**Republic.....Respondent**

*(Appeal against Judgement, sentence and conviction in Criminal case number 51 of 2014, R vs Cyrus Maina Gakuru at Mukurweini, delivered by Weddy K. Micheni, SPM, on 30.6.2014).*

**JUDGEMENT**

This being a first appeal this court has a duty to make a complete and comprehensive appreciation of all vital features of the case, and to scrutinize the evidence on record with care and caution and also to see that justice is appropriately administered. It is also a duty of this court to weigh the materials and to consider the evidence objectively and dispassionately<sup>[1]</sup> and arrive at its own conclusions.

The appellant was convicted of the offence of rape contrary to Section **3 (1) (a) (b) (3)** of the Sexual Offences Act<sup>[2]</sup> and sentenced to **20 years imprisonment**. The particulars of the offence were that on the 13<sup>th</sup> day of February 2014 at Kiuu Sub-location in Mukurweini sub-county within Nyeri County, intentionally and unlawfully caused his penis to penetrate the vagina of **A M W** without her consent.

The prosecutions counsel in her written submissions urged the court to uphold both the conviction and sentence.

In the lower court, the prosecution called a total of eight witnesses whose evidence is summarized below. **PW1**, who was the complainant narrated how the complainant raped her. **PW2** informed the court that **PW1** informed her that she was raped by the appellant while **PW3** a brother to the complainant testified that he was informed of the alleged rape by **PW2**. **PW7** is the Doctor who produced the P3 form. The evidence of this witness is crucial because she stated "*on clothing, the undergarments were blood stained*" which contradicts sharply with the contents of exhibit no 5 which was a document prepared by the government analyst dated 18 June 2014. This report concluded that:-

- i. *The pant was not stained with blood, semen or spermatozoa.*
- ii. *The underwear was not stained with blood.*
- iii. *The vagina swab was not stained with semen or spermatozoa.*
- iv. *The DNA profiles generated from the blood samples are tabulated at the end of the report.*

Clearly, there are contradictions between the evidence in the P3 form as presented by **PW7** and the report by the government analyst and in my view the said evidence is crucial for the purposes of collaborating the testimony of the complainant.

Regarding the above contradictions, guidance can be obtained from the decision by the Uganda Court of Appeal in *Twehangane Alfred vs Uganda*<sup>[3]</sup> where it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:-

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

Thus, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.<sup>[4]</sup> The question to be addressed is whether the above contradictions are grave and point to deliberate untruthfulness or whether they affect the substance of the charge.

At this juncture, it is important to examine the nature and meaning of the word contradiction. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria*<sup>[5]</sup> where the court stated 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 a 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."*

In the above cited case it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.<sup>[6]</sup> It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.<sup>[7]</sup>

In my view, the above contradictions are substantial and create serious doubts in the mind of the court. The court is obliged to consciously remind itself to be careful while considering evidence with such glaring contradictions. In addition the court should seek to safeguard or reduce the risk of a wrong finding based on suspect evidence.<sup>[8]</sup>

The trial court should weigh all the evidence and consider the merits and demerits, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence. The court held that the principle in criminal proceedings is that the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough.<sup>[9]</sup> It follows that the onus rests on the state to prove every element of the crime alleged, including that the appellant is the perpetrator, that he had the required intention and the crime in question was unlawful.<sup>[10]</sup> In order to be acquitted, the version of the appellant has to be reasonably possibly true.<sup>[11]</sup> Nugent J in **S v Van der Mevden** (*supra*) said that:

*"... These are not separate and independent test, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are being inseparable, each being the logical corollary of the other."*

It is also trite law that an accused person should only be convicted on the prosecution case and not on the weakness of his defence as it was held in the case of **Sekitoleko vs. Uganda**.<sup>[12]</sup>

I take the view that it was necessary for the trial court to weigh all the evidence in totality and in particular, had the court addressed its mind the above contradictions and inconsistencies in the evidence, its decision could have been different. I find that the aforesaid contradictions render the evidence on record totally unsafe to form the basis of a conviction. Accordingly, I find this appeal succeeds.

Accordingly, I allow this appeal, quash the conviction and set aside the sentence and order that the accused **Cyrus Maina Gakuru** be set at liberty forthwith unless otherwise lawfully held.

Signed, Delivered and Dated at Nyeri this **21<sup>st</sup>** day of **July** 2016

**John M. Mativo**

**Judge**

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[1] K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015

[2] No. 3 of 2006

[3] *Crim. App. No 139 of 2001, [2003] UGCA, 6*

[4] See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217 & uGANDA VS

[5]{2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[6] See Osetola vs State {2012} 17 NWLR (Pt1329) 251

[7] See Theophilus vs State {1996} 1 nwlr (Pt.423) 139

[8] Schwikkard and Van der Merwe, **Principles of Evidence**. 3<sup>rd</sup> ed 2005.

[9] See S v Shackell [2001 \(4\) SA 1](#) (SCA)

[10] See Schwikkard and Van der Merwe: Principles of Evidence (3<sup>rd</sup> ed) at paragraph 31.3.1.

[11] S v Van der Mevden [1999 \(1\) SACR 447](#) W)

[12] {1967} EA 531