



**BWW alias T v Republic (Criminal Appeal E025 of 2024)  
[2025] KEHC 10713 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10713 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E025 OF 2024  
DKN MAGARE, J  
JULY 21, 2025**

**BETWEEN**

**BWW ALIAS T ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. D. N. Bosibori (SRM) in Mukurweini CMSO Case No. E012 of 2022 delivered on 09.05.2024 and sentence given on 20.05.2024)*

**JUDGMENT**

1. This is an appeal from the conviction and sentence of Hon. D. N. Bosibori (SRM) in Mukurweini CMSO Case No. E012 of 2022 delivered on 09.05.2024 and sentence given on 20.05.2024. The appellant was charged with the offence of rape contrary to Section 3(1)(a) and (b) as read with 3(3) of the *Sexual Offences Act*. The particulars being that on 24.06.2022, at around 2.00 am at [Particulars Withheld] area in Nyeri central sub-county within Nyeri County he intentionally and unlawfully caused his penis to penetrate the genital organ namely vagina of SWW without her consent.
2. There was an alternative count of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*. The particulars were that on 24.06.2022, at around 2.00 am, the appellant while at [Particulars Withheld] area in Nyeri central sub county within Nyeri County, intentionally and unlawfully committed an indecent act with an adult by touching the vagina of SWW against her will.
3. The appellant was arrested on 22.09.2022 and taken to court on 31.10.2022. He pleaded not guilty to the main count and the alternative count. The appellant was released on bond of Kshs.100,000/=. The court directed that the Appellant be provided with legal representation. However, there were no bond proceedings on record. Upon hearing the witnesses, the court convicted the accused and sentenced him



to 15 years in prison. It is against this that the appellant filed the Petition of Appeal dated 6.06. 2024 and set forth the following grounds:

- a. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant relying on evidence of witnesses which was not sufficient and cogent enough to warrant such a conviction or sentence.
  - b. The learned trial magistrate erred in law and fact by not considering the Appellant's evidence in its entirety. A miscarriage of justice was occasioned.
  - c. That the learned trial magistrate erred in law and in fact in convicting the appellant while the evidence on record was marred with inconsistencies, contradictions and was uncorroborated occasioning a miscarriage of justice.
  - d. That the learned trial magistrate erred in law and in fact in engaging in extraneous matters and allowing her personal views to take precedence into the proceedings.
  - e. That the learned trial magistrate erred in law and in fact in considering hypothetical evidence and proceeded to convict the appellant in the absence of compelling evidence from the prosecution occasioning a miscarriage of justice.
  - f. That the learned trial magistrate erred in law and in fact shifting the burden of proof to the appellant and completely misunderstood the case that was before her, and further misconceived the issues and as a result came to a wrong decision.
4. The first witness was Winnie Mwangi, a Clinical Officer II. She graduated with a Diploma in Clinical Medicine and Surgery in 2013. She had been working in district hospital since 2016. She saw the complainant and prepared PRC and P3 on 24.06.2022. The documents indicated that the clothes were soiled, bloody and stained. She complained that she was physically and sexually assaulted by the Appellant at [Particulars Withheld] New Express Inn.
  5. According to her, the complainant sustained deep cut wounds on the face, hands and left side gluteus maximus. She was conscious but anxious, though smelling alcohol. There were deep cuts on the left index finger, and a deep cut on the left side. There was a deep extensive cut wound on the left side gluteus maximus buttock area. The injuries were hours old.
  6. The complainant had bruises on the clitoris, hymen was old broken and was on menses. She was admitted between 24.06.2022 and 01.07.2022. She filed the PRC in the presence PC Mwikali. The witness continued that the complainant had restated the injuries in the PRC as a 2 by 3 cm, by 2 x 4 cm, and 2 x 2 cm cut wound on the left index finger above the nail, among other injuries. The witness concluded that the complainant was sexually assaulted. The complainant was treated with antibiotics, sutured and administered with post-exposure prophylaxis.
  7. There were no spermatozoa seen but there was blood, pus cells, red blood cells and VDRL negative. A discharge summary dated 1/7/2022 filed by Muriithi was produced. The complainant was discharged on pain killers. The witness also produced the lab results from the same hospital for HVS. There was also a request for pregnancy test done and lab results produced as evidence.
  8. On cross examination the witness stated that the complainant went to the hospital on 24/6/2022 and was admitted in the morning. On cross examination by the court, she stated that menses began on 21.06.2022. On reexamination she stated that the bruises on the clitoris were consistent with rape.
  9. The next witness was the complainant. She testified that she works as a secretary and was a mother of one. The complainant did not know the Appellant before the incident. She recalled that on 23.06.2022



- at around 5 pm, she got information in a group posted by Sydney that there was a job at Jubilant Nest. She texted to Sydney that she was interested. She was given the supervisor's number. The supervisor was Tracy. She referred her to the manager, one Alex. The complainant required 2 days before commencing. The manager solicited for a bribe and told her to present herself physically on that day. The manager was the Appellant herein.
10. The complainant hailed a motor cycle taxi from Othaya to Nyeri where she arrived at 7.30 pm. Upon reaching Naivas Supermarket she called both the Appellant and Tracy. The Appellant indicated that he was to go to the place where the complainant was. After some wait, the three, that is, the Appellant, Tracy and the complainant met, but Tracy left. The duo went to Kungu Maitu Butchery. The Appellant promised to make the complainant rich as he had done to Tracy.
  11. After some discussion, the Appellant came with some Chrome gin. She took one tot. She was given another tot but poured it on the floor while the Appellant was away. The appellant then told her that they go to club Dribbz to meet Tracy. When she inquired on the whereabouts of Tracy, she was told not to worry as she was joining them in a short while.
  12. The witness continued that the Appellant brought keg but the complainant declined to partake. My understanding from anecdotal evidence is keg is a pressurized metal barrel with a valve at one end, used to store and dispense beer. The beer in the said barrel is also colloquially known as keg. It is meant to be affordable to certain lower economic classes who will otherwise be consuming illicit brew.
  13. The Appellant also brought samosas, triangular savoury pastries fried in oil and stuffed with various fillings, often meats. The complainant ate one samosa. Some men arrived and the Appellant indicated to them that the complainant was his friend. The Appellant ordered for another drink, Snapp, but the Appellant did not consume it. Shortly after, the complainant fell into a deep sleep. Upon waking, she discovered that the Appellant had taken her bag and phone.
  14. The complainant continued that the Appellant handed back the shawl to her. She then requested to be taken to Tracy's home. The Appellant agreed and suggested a shortcut. However, like many shortcuts, it led to misery. Upon reaching a certain area, the Appellant began to assault the complainant, all the while making contradictory remarks, that is, promising her a job while simultaneously calling her a whore. They struggled on a patch of napier grass, where the Appellant told her that he intended to rape and kill her. In an attempt to deter him, the complainant claimed she was HIV positive, but the Appellant responded that it was not his problem but hers.
  15. It was her evidence that the appellant removed a bottle which was then broken by hitting it on the ground. The appellant cut the complainant on the face, forehead, both arms, thighs and both arms. The court noted that these scars were visible. They struggled and at some point the appellant sought to get the PIN for the Mpesa which was not given. She managed to escape and seek help from a watchman who assisted her to call a catholic priest, Fr. Gachanja at 3 am. The priest after being given the ordeal came and picked and toot her to Mûkûrwe'inî hospital. She was treated and admitted at about 4-5 am. She had blood stains without wounds.
  16. According to her, the appellant raped the complainant near napier grass after the appellant lifted the dress after struggle. He penetrated her and had sex several times but the complaint could not recount the number. She denied consenting to the sex. The appellant had not even requested for sex. She denied having had sex during the duration she had taken alcohol and slept for a long time. The incident was reported and the scene was visited, wherein her braids were found at the scene. They found pieces of the bottle, braids, her blood on the napier grass, the Appellant's cap, and grass on walls of a house therein. The police took phone data. The witness was treated, put on pain killers and PEP. PEP took 21 days.



The wounds were stitched. She was discharged on 1.07.2022 with her discharge summary which she identified. She stated that the accused did not ejaculate during the ordeal.

17. On cross examination, she stated that the Appellant called her on phone and she was to attend interview in Nyeri. She denied telling the Appellant that Tracy was her cousin. She stated that the Appellant used drinks in the two establishments. She denied ordering drinks. She stated that after partaking the samosa she slept. The Appellant did not partake. It was her evidence that three men did not accompany her but it was the Appellant who did. She denied going for a quickie with one of the men. No questions regarding penetration or alibi were raised. PW2 was recalled for cross examination by Mr. Ombongi. She stated that she saw an advertisement for a job which Sydney posted. She stated that Sydney and Tracy confirmed that the appellant was the manager of Jubilant Hotel. Further, she stated that Tracy introduced the appellant to the complainant physically. Though his real name was Brian, he introduced himself as Alex. She stated that she later learnt that there was no job at the hotel. It was Alex and Tracy who planned to put her in harm's way. She recalled that she asked Alex to take her back to Othaya but he refused.
18. She stated that the Appellant deliberately beat her and assaulted her. Her cries for help did not help since the boda bodas did not stop. Her voice was hoarse the following day from screaming. She stated she could not tell whether she was drugged when she fell asleep. It was her evidence that she tried to defend herself but the Appellant overpowered her. She denied that they were ambushed by thugs or that she declined a taxi. She did not lose any of her personal items (of course other than dignity). She identified the Appellant as the perpetrator and no one else.
19. The complainant was further recalled to identify the exhibits. She identified them and gave history on how the exhibits were recovered. On cross examination she stated that she was present when the exhibits were recovered. That is the hair piece, beer bottle pieces and grey cap. The inner wear with the sanitary pad attached was removed at the scene. She placed them in her purse. The same had grass. She gave the underwear and pad to the police. The witness stated that she was on her menses. The witness did not manage to wear the pad after the incident. At the hospital she removed the underwear and gave the nurses after telling the police she was on menses. the witness could not recall whether she wore the underwear or not but could remember she picked it and ran as the appellant had cut her. I found some of the questions asked were meant to demean the witness and did not go to the root of the appellant's case.
20. On re-examination, she stated that the motor cycle taxis refused to stop at that hour. She believes that she was drugged since she had taken only one tot and was not drunk.
21. The court noted, and correctly so, that the demeanour was candid and appeared truthful. She did not hesitate to answer questions. She became emotional once during the hearing. I will hasten to add that her evidence has internal consistence and has no contradictions. The appellant thereafter appointed a lawyer who requested to recall for cross examination, PW1 and PW2, who had hitherto testified. The particular evidence is joined with the original evidence of the particular witnesses.
22. PW3 was M, the complainant's mother, who testified that the daughter was born on 3.06.2000. Incidentally, it is on her birthday that I started writing this judgment as I mark the Uganda martyrs day. She did not know the Appellant prior thereto. She was called by Fr. Gachanja at 5 pm telling her the complainant was in trouble. She visited the hospital and found the complainant injured. She made the report at Múkúrwe'inî police station at 7 pm on the day of the incident. She was not cross examined.
23. On being recalled she stated that the complainant worked at a parish secretary. But was not staying at the same place as the witness. The witness was cross examined on whether the complainant partook



- alcohol. She stated that it is Fr. Gachanja who was informed of the ordeal and not her. On re-examination she stated that she was aware that the complainant was assaulted and raped.
24. After a series of adjournments, the appellant delayed the matter by another series of complaints, which necessitated SSP Charles Kimanzi and other officers to testify that he investigated the complaint and found it not true. The rest of the proceedings in relation to that complaint are not of relevance to this matter.
  25. PW1 was recalled where she indicated that the main complainant in the PRC was sexual assault. She stated that the court is to come to the conclusion that the complainant was raped. The witness stated that the PRC and P3 does not satisfactorily show the complainant was raped.
  26. PW4 was Rev. Fr. Josephat Mburu Gachanja who testified that he is from St. Cyprian where he had served for 2 years and 6 months. He stated that he knew the complainant. She was a secretary from November 2021 to 23.06.2022. He recalled that on 23.06.2022 at 1 pm the complainant requested for a letter for a job she had sighted online. The witness duly signed the letter and went back for adoration. Later at 6.30 pm, he called for a diary, wherein the complainant informed him that she was not around the church as she was on her way to Nyeri to take the letter to a potential employer. The complainant informed him that the supervisor wanted the complainant to be a receptionist the following day. The complainant informed him that interview was to be conducted the evening and if successful, she was to hand over the parish the following day. She told the witness that the interview was at Jubilant hotel, which hotel was known to PW4.
  27. At 8.40 pm the complaint told PW4 that she was almost through with the interview, and was at a certain pub in Nyeri. The witness slept at 3.20 am. Later, he received a reverse call from a strange number which he picked and heard the complainant's voice. She requested that he goes to rescue her as the potential employer had raped her and wanted to kill her. PW4 left and went to Christian Life Church, where he arrived after 25 minutes. The complainant lay on the ground and was bleeding. She told the witness that people wanted to kill her.
  28. The witness visited the hospital after two days. He found her face was swollen and could not see. The witness prayed and identified himself. There were no blood stains as they had been cleared. The witness had never seen the Appellant before.
  29. On cross examination the witness stated that the complainant was a parish secretary who was employed when PW4 was in the parish. The witness stated that he was concerned that the complainant left late in the evening. The witness stated that the complainant told him that she had been raped. He stated that the complainant did not appear to stagger when in the church compound [Christian Life Church]. According to PW4, the complainant did not account for what happened between 8.40 pm to 4 am. However, she told the witness that she had a sexual attack and sustained physical injuries from the struggle with the manager. On re-examination he stated that the complainant lost a lot of blood.
  30. The matter was subsequently adjourned for one reason or another, with blame being equitably shared around. On 31.10.2023, PW5, Pamella Kamalla Okello, from the Government Chemist testified that she was a Government Analyst. She stated that on 28.06.2022, the government chemist received a request from PC Jared Sasi from Múkûrwe'inî police station. The purpose was to examine certain items and establish presence of biological materials on them. The items were broken pieces of Snapp Alcohol in a Khaki envelop, a human braid with human hair attached. These were recovered from a scene of accident.



31. They also received a woollen cap, recovered from the scene, a red coloured dress, light blue underpants with sanitary pads. They also received blood swaps from the 2 parties. A preliminary examination revealed that:
  - a. The broken bottle had stains of human blood.
  - b. Dress and underpants were stained with blood and semen.
  - c. The woollen cap was soiled but did not have blood or semen.
  - d. A human braid with human hair attached was not stained with blood or semen.
32. The Government Chemist carried out analysis of DNA samples from the complainant and found as follows:
  - a. The blood stains from the broken beer bottle, dress and underpants matched profiles of the Appellant and complainant.
  - b. Semen stains on the dress did not generate any profile.
  - c. Semen stains on the underpants and pad generated a mixed DNA profile. One side matched the buccal blood sample of the Appellant and matched the profile generated from sample agent blood from the complainant.
  - d. The woollen cap was soiled but did not have blood or semen.
  - e. Human hair attached to braided hair piece generated DNA profile generated from sample agent blood from the complainant.
33. With exception of biological materials that could not be returned, the witness produced the DNA Report, exhibit memos dated 26.06.2022 and 28.06.2022, broken bottles, maroon dress underpants and pad, grey woollen cap. PW5 was recalled to indicate educational background. She stated that she had a diploma and higher diploma in applied sciences and graduated in 1998 and 2003 respectively. She also has a master's degree from Egerton University.
34. On cross examination, she stated that semen on the dress was not concentrated enough to generate a profile. The DNA samples were from the complainant and appellant. She could not state the age of the sample. She stated that the examination was not based on history but on the presence of biological material.
35. On re-examination the witness stated that the DNA profiles on the blood on the dress matched that of the complainant but semen was not concentrated enough to generate profiles. It did not belong to someone else. The Appellant further re-examined on whether the semen on the dress belonged to someone else. Nothing was asked of the semen with matching DNA profiles. She stated that she was served with summons.
36. PW6 was PC 102108, Elizabeth Mwikali from Múkûrwe'inî, performing general duties. She was the investigating officer for this case. On 23.06.2022 at 6 pm she received a call from PC Peter Theuri about a rape reported at the station. She rushed to the hospital and found the victim had been taken to múkûrwe'inî hospital. She visited the hospital and found her receiving treatment. She had injuries in the forehead, thighs, and hands. She was accompanied by PW3 and PW4. The complainant informed the witness that she had been raped the previous night.
37. She visited the station and recorded OB and returned to the hospital and noted that she had been admitted. She visited the scene with PC Joram Muthengi, PC Dennis Moyo and DCIO, IP Kiptanui



- and the victim led them to [Particulars Withheld] area, near Nyeri Town. They collected exhibits from the scene, that is, broken glass bottles stained with blood and a grey woollen cap belonging to the Appellant. They passed by new life church near Ruringu and recorded a statement from James Mbario. She then escorted the complainant back to hospital for admission. She recorded the complainant's witness statement, who narrated to her how she saw an advertisement at a WhatsApp group called Queens for a receptionist at Jubilant Hotel. At noon of 23.06.2022, the complainant was at Kagicha Catholic Church.
38. The witness continued that the complainant was linked by Sydney to Tracy alias Tina. The later linked the complainant to the Appellant who alleged that his name was Alex and he was the hotel manager. The Appellant, complainant and Tracy met in Nyeri Town in the evening for interview at around 7 pm. Tracy excused herself and left after a few minutes and was to join them later, which was never to be. The Appellant suggested that they proceed to Kungu Maitu hotel, where the appellant ordered Chrome gin and brought two glasses, which they partook. The complainant started wondering whether it was an interview but was asked to await Tracy.
39. The appellant on being asked about Tracy, he stepped out to call her. He returned only to suggest that they go to a different hotel. They went to the other club but Tracy was not there. The complainant insisted on meeting Tracy. And even called her but did not respond. The complainant became sleepy and was woken by a bar attendant who wanted to take a food or beer order on the request of the Appellant. The appellant was known as JD Tenta, or Alex or Brian Warui Waithegeni. The complainant requested that the Appellant drop her at Tracy's so that Tracy can drop the complaint at the parish. At that time the Appellant had been joined with three other men. The appellant ordered snacks which the complainant declined to partake.
40. The appellant had taken the complainant's shawl and phone. On the request to drop the complainant at Tracy's house, he agreed and escorted the complainant on foot through temple court. The appellant went ahead to attack the complainant. The complainant tried to lie to the appellant that she was HIV positive but all in vain. She told the appellant that she was in her menses but he could not listen. He raped her while she struggled and finally escaped to New Life Church after being assaulted and raped. She sought for help from a watchman who called the priest who came and took her to the hospital. The witness recorded statements from the priest who confirmed receiving a phone at 4.00 am and subsequently helped her.
41. The witness further testified that she received the evidence and forwarded to the government chemist for analysis. On 29/9/2022 she received information that the Appellant had been arrested over other cases. She informed the appellant and charged him with the offence. The appellant was taken to the Government Chemist and buccal swabs taken. Part of the evidence is inadmissible as the court ought not to record the contents of the appellant's charge and cautionary statement. It did not however amount to a confession.
42. She stated that the accused had lied that he was Alex yet he was DJ Tenta. She identified exhibits that were recovered including the dress surrendered by the complainant. The underwear and sanitary pad had napier grass. These were also blood stained. She identified all the exhibits on record and produced others.
43. On cross examination, she stated that she visited the hospital immediately. The complainant was said to be bleeding profusely hence the *raison d'être* for taking her to hospital directly. They later visited the scene where the victim showed the scene. She continued that the victim was taken from the hospital bed. She stated that she saw the advertisement but did not capture them. The witness could not trace Sydney and Tracy.



44. Further, she stated that she visited Jubilant Nest Hotel at Gatitu. She found that Sydney and Tracy's numbers were switched off. Most of the evidence in cross examination did not go to impeaching evidence on occurrence of the offence. She testified that the Appellant told her that thugs attacked them with knives. She did not believe the information.
45. The court found that the Appellant had a case to answer. The ruling was unnecessarily long. In analysing the evidence at this stage, the court was not expected to give a detailed analysis and arrive at a firm finding on the guilt of the accused. R. Lagat-korir, held as follows:

Without saying much thereon so as not to compromise the defence the accused is likely to offer as was stated by Justice J.B. Ojwang as he then was in the case of *Republic v Samuel Karanja Kiria* Cr. Case No.13 Of 2004 Nairobi [2009] eKLR as follows:-

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted.” (Emphasis added).

46. The Appellant gave sworn testimony on 11/02/2023. He stated that Tracy asked him to keep a friend company in the evening since she worked at night. He was a dance choreographer, DJ and a plumber. The friend was Wahito. He found Tracy with another girl he didn't know at Naivas Supermarket. They introduced as Tracy left for the Chaka area. Tracy hailed a motor cycle and left. They had agreed that Wahito was to spend at Tracy's house upon her return. He asked for an alcoholic drink and each one of them, that is the complainant and the Appellant, took. The appellant proceeded that the complainant claimed to know the Appellant as DJ Tent, which was answered in affirmative. The complainant sought for a selfie but the appellant declined. The complainant was excited and started touching the Appellant's hand.
47. After 15 minutes they rose and had a quickie in the washrooms. The appellant was drunk but did not resist the complainant's advances. She later realised that she was on her menses and got angry. The complainant insisted on stepping out, which the appellant insisted was unsafe since the place was near Majengo slums. He waited for 20 minutes and left for Drip's Nightclub until early morning. He was later arrested on a date he could not recall. And informed of the offence of rape.
48. He denied committing the offence and stated that they had sexual intercourse voluntarily. He did not escort her. He stated that if she got injured, he did not injure her as she left the night club. He stated that the DNA was on the sanitary pad because he had engaged in voluntary sexual intercourse. He stated that DNA could not have been on the innerwear as the same was removed and was not put back. He stated that the scene had security lights and many people, others as YMCA station nearby guarded by police officers. He stated that the cap did not belong to him. He stated on re-examination that he had no reason to injure the complainant.
49. The court in a lengthy 51 page judgment convicted the Appellant and later sentenced him to 15 years.



## Impugned Judgment

50. The court set out the prosecution case and defence evidence. It was the court's finding that it had 2 issues, that is whether the appellant had carnal knowledge with the complainant and whether the appellant committed an indecent act with the complainant. The court addressed the burden of proof. The court was not convinced of the appellant's version of events and believed the complainant's evidence. The court then repeated the entire evidence in its judgment. It is one of the most difficult judgments to read. Though the court set out to find issues which were not really in issue, it ended determining the issues in the matter.

## Submissions

51. The Appellant filed submissions dated 13.2.2025. It was submitted that the Respondent failed to prove the ingredients of rape as required under Section 3 of the *Sexual Offence Act*.
52. Reliance was placed on *Woolington v DPP* (1935) AC 462 based on which it was submitted that the offence of rape was not proved beyond reasonable doubt and the trial court erred in convicting the Appellant.
53. The Appellant also submitted that there was glaring gaps and mistakes in the case fronted by the Respondent based on which the Appellant ought to have been acquitted. Reliance was placed on the case of *Musoke v Republic* (1958) EA 715.
54. On the part of the Respondent, they filed submissions dated 24.3.2025. It was submitted that the Respondent proved the existence of the fact of penetration without consent. Reliance was placed on *Republic v Oyier* 1985 KLR 3 53. The Court of Appeal reiterated thus:
- Lack of consent was an essential element of the crime of Rape. The mental element is to have intercourse without consent or not caring whether the woman consented. To prove the mental element required in Rape the prosecution had to prove the complainant physically resisted, or that she was not in a position to decide whether to consent or resist. Here a woman yields through fear of death or through duress, it is rape.
55. It was also submitted that the appellant's DNA was positive on the semen found on the complainants' sanitary towel, and as such conclusive proof that indeed it was the appellant to the exclusion of anyone else who indeed raped the Complainant.

## Analysis

56. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the case of *Peters v Sunday Post Limited* [1958] EA 424 where, the Court of Appeal therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



57. An Appellant on first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination and to the appellate court's own decision on the evidence. The court of Appeal in *Kiilu & Another v Republic* [2005] 1KLR 174, stated as hereunder:

An Appellant on first appeal is entitled to expect the evidence as a whole submitted to 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 conclusion. It is not the function of the first appellate Court to merely 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 witnesses.

58. An appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and to reach its own decision. It is not a finding whether there was evidence to support the decision. This duty is addressed succinctly by the former court of appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

59. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. In the case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

“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 v R*, [1957] EA 336) 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. (*Shantilal M. Ruwala v 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 findings and conclusions; 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 v Sunday Post*, [1958] EA 424.”



60. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision *in Re Winship* 397 US 358 {1970}, at pages 361-64 that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

61. The offence of rape is provided for under Section 3 of the *Sexual Offences Act*.

- (1) A person commits the offence termed rape if—
  - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.
- (2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.
- (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.

62. Intentionally and unlawfully is set out in Section 43 of the *Sexual Offences Act*. It provides as follows:

- (1) An act is intentional and unlawful if it is committed—
  - (a) in any coercive circumstance;
  - (b) under false pretences or by fraudulent means; or
  - (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
- (2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is-
  - (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
  - (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
  - (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.
- (3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person—



- (a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;
  - (b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or
  - (c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.
- (4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act-
- (a) asleep;
  - (b) unconscious;
  - (c) in an altered state of consciousness;
  - (d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;
  - (e) mentally impaired; or
  - (f) a child.
- (5) This section shall not apply in respect of persons who are lawfully married to each other.
63. The Court below was dealing with lack of consent. There was no evidence of any consent being obtained. The complainant gallantly fought throughout the ordeal to salvage her dignity and integrity as a human person. She ended with severe injuries and she was unfazed. She called for help, which help came in terms of PW4. PW4 gave cogent evidence on the happenings and how he was updated. He did not get responses until about 4 am when he received the fateful call. He came within 25 minutes. This evidence was not shaken.
64. It corroborated the evidence of PW1 in material particulars, especially regarding time. The appellant did not respond to two material aspects, that is, the interview and the relationship with Tracy. However, the state had a burden of proof. The most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington v DPP* [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;
- “Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
65. The Appellant admitted to having sex with the complainant, but stated that the same was consensual. The issue of who the perpetrator is and penetration are thus not in dispute in this appeal. The same



were proved beyond reasonable doubt. They are also admitted. The understanding from the appellant is that he is raising two defences with two subsets as set out in (b) below:

- a. That the sex was consensual and, in a bathroom,
- b. The attack on the complainant was by thugs in an unknown place,
- c. An alibi in line with (b) above.

66. The sole question in this appeal is whether the sex was consensual. Consent is defined in Section 42 of the *Sexual Offences Act* as doth:

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

67. 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. In other words, the elements of rape are as follows:

- a. Penetration
- b. lack of consent
- c. If there was consent it was obtained by force, or threats or by intimidation.

68. In this case, the only issue is lack of consent. The state did not allege that the consent was obtained by force, or threats or by intimidation. No consent to the ordeal. The complainant was literally, from her evidence, robbed of her dignity through rape with force. That did not deter the complainant from refusing and fighting back and finally escaping after fact. Her evidence was that the lack of consent resulted in dire consequences on her, that is multiple cut wounds on the face, hands and buttocks.

69. The element of consent in rape cannot be overstated. Whether or not consent was expressly denied or was denied at first and then given later and vice versa, are matters of fact and can be determined using evidence. In the case of *Charles Ndirangu Kibue v Republic* (2016) eKLR, the court held thus:

One of the central elements of the offence of rape is the question of whether the complainant consented to the penetration by an accused. Additionally, it should also be noted that the complainant must also have the capability to consent as well.

70. Chief Justice King in *Question of Law Reserved on Acquittal* (No 1 of 1993), said:

“The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.”

71. In his written works, Peter Westen, *Some Common Confusions About Consent in Rape Cases*, *Ohio State Journal of Criminal Law*, Vol. 2, Page 334 opines thus:

Consent to sex matters because it can transform coitus from being among the most heinous of criminal offenses into sex that is of no concern at all to the criminal law. Unfortunately,



the normative task of making the law of rape more just is commonly impaired by conceptual confusion about what “consent” means. Consent is both a single concept in law and a multitude of opposing and cross-cutting conceptions of which courts and commentators tend to be only dimly aware. Thus, consent can be a mental state on a woman’s part, an expression by her, or both; it can consist of facts about a woman’s mental state or expressive conduct that do not necessarily constitute a defense to rape, or only such facts as do constitute a defense to rape; and it can consist of facts about a woman’s mental state or expressive conduct, or a legal fiction of such facts. In so far as we are unaware of the ways in which this conceptual framework structures the way we think about consent, we risk confusing ourselves and others in undertaking to make the law of rape more just. Some examples are (1) confusion as to whether the defense of consent ought to be deemed to consist of a mental state on a woman’s part or an expression; (2) confusion about the relationship between consent to sexual intercourse and resistance to it; and (3) confusion about the relationship between force and non-consent.

72. In the persuasive authority of *Peter Wanjala Wanyonyi v Republic* (2021) eKLR, Kimaru J. (as he then was) held that:-

“The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case”

73. The foregoing does not in any way place the burden on the appellant as an accused person. This is because, an accused person enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the state has on evidence put before the court satisfied it beyond a reasonable doubt that the accused is guilty. In the case of *R v Lifchus* {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

“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 guilty 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 guilty beyond reasonable doubt.”



74. The legal burden is the burden of proof which remains constant throughout a trial on the prosecution. According to *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

75. The locus in quo was said to be in a napier grass field along temple road. This was in the middle of the night. The Appellant was with the complainant for almost the entire night on the material day. Before the Appellant met her, the complainant was not having any injuries. She was lured by Tracy to the Appellant who then disappeared without a trace. They lied to the complainant that she was to sleep in Tracy’s place. The imbroglio is then to translocate the complainant from the bathroom to the gate of the New Life Church.

76. If the Appellant is to be believed, he was with the complainant until she wanted to step out to buy a sanitary pad. He waited for 20 minutes and then went to Drips nightclub. Is this a behaviour consistent with a person who had a guest entrusted to him and with whom they have just had sex, surely, he could have called or even reported or otherwise showed concern. In his defence, the appellant chose a story that does not make sense. I was remembering the words of Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N v N* [1991] KLR 685. The learned Judge lamented as follows:

“Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N v N* [1991] KLR 685 when he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

77. This same sanitary pad was dripping with his sperms and DNA. The appellant was sure the town was unsafe and had no shops open. The lower court was thus right in disbelieving the lies concocted by the Appellant. It is not lost that during the examination in chief, nothing was suggested to the complainant that they had consensual sex in the bathroom. On the other hand, the complainant knew that she had menses and even told the Appellant that she was HIV positive. The latter was an Abrahamic lie to save herself. This was a similar tactic in Genesis 20, Abraham used to lie to Abimelech, the king of Gerar, by saying that Sarah was not his wife, but sister, to avoid potential harm to himself. Unlike Abraham, the complainant suffered harm.

78. The so-called consensual sex ended with the complainant getting an injury to the clitoris. This is consistent with forced penetration. Why will a well lubricated clitoris in a consensual sex be injured?



79. The Appellant relied on the medical evidence that semen was not present. This goes to the expert evidence. The court is aware that medical field is not rocket science but an approximation. However, expert evidence must be seen as against the totality of the evidence. How do you treat medical evidence that is to the effect that there was no enough evidence of penetration when the parties agree there was penetration? The evidence of the Government Analyst was to the effect that the buccal swap from both the Appellant and the complainant showed that the semen found on the exhibits belong to the Appellant. The court thus posits that while courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and that the courts must accept them. In *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- “Because this is the evidence of an expert, I believe it.”...”

80. Expert evidence is not binding on the court. It is merely advisory. The court may accept it, or reject it, depending on whether or not the court is convinced by the reasoning given by the expert to support his or her conclusions. In other words, expert opinion must be weighed and considered like any other evidence. It is not to be accepted solely because it comes from an expert. In dealing with expert evidence the court does not take the evidence as the Gospel truth. In the case of *Stephen Kinini Wang'ondou v The Ark Limited* [2016] eKLR the court stated as follows:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called. While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.

(11) Four consequences flow from this. Firstly, expert evidence does not “trump all other evidence”.<sup>7</sup> It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is



therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.<sup>9</sup>Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing.<sup>12</sup> A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[12]”

81. The question of penetration was settled. The medical evidence must be read in context with other evidence. This includes the appellant’s evidence that there was penetration. The government analyst found semen in the complainant. The complainant ended up in New Life Church injured and with the appellant’s semen in her vagina and sanitary pad. The Snapp bottle, a drink similar to the one the Appellant earlier ordered was found on the locus in quo. It had the Appellant’s semen.
82. The broken bottle was found with human blood which ended up being complainant’s. The DNA in the semen in the sanitary pad and the undergarment had the Appellant’s and the complainant’s DNA. The results were statistically that the DNA could only belong to the duo and no one else. The blood in the hair strand found at the locus in quo shows it belonged to the complainant. The net effect was that the scene of crime was at the field where the complainant stated she was attacked by the Appellant. This therefore rules out the sex in the bathroom.
83. The next question is whether the sex, at the said locus in quo was consensual. To answer this question, the court will, from the evidence, reconstruct the entire scene in two paragraphs. The complainant was employed at a church but was still seeking for greener pastures. An advertisement was placed by Sydney regarding a job in a hotel, whether genuine or not, in the Queens WhatsApp wall. The applicant found the deal to be good and applied. A sense of urgency was created by Tracy, who, the appellant admitted was working with him three months before the incident. The two conspired to use the incident to lure the complainant to appellant’s den. The fact that Tracy was a woman was used to assure the complainant of her safety. The complainant was a 22-year-old single mother, struggling to raise her child and thus vulnerable to the Appellant’s machinations.
84. The duty of Tracy was accomplished. The appellant knowing Nyeri town very well set out to make the complainant drunk before he did his nefarious act. Unfortunately for him, the complainant poured out the second tot, hence maintained her sobriety. To make her more malleable, she was served with samosas, which resulted in her sleeping.
85. Waking up she found the Appellant with her shawl and phone. Having been alerted by her fear that what was happening was not an interview, she sought to be taken to Tracy’s place. She however suffered a disability of ignorance, *vitium ignorantiae*. Being a new person, she did not know the route to Tracy’s home. Any route taken was sufficient. Reaching a perfect spot, the appellant overpowered the complainant and raped her. He did not expect to meet the menses but nevertheless proceeded. He was injured in the process but the complainant was injured more. She run as much as she could in the



circumstances and sought refuge in church. Not trusting other people she called the priest, PW4 to rescue her and the rest is history.

86. The nonconsensual nature of the sex was brought out in every witness and in a rather ironical way by the Appellant. PW1 found soiled and blood-stained dress and coat. She gave history of assault by a person known to her at new [Particulars Withheld] area near Express Inn. She suffered a deep cut, hands suffered deep cuts, injuries on the gluteus region of the buttocks. This was consistent with injuries that are rape related. There were equally deep cuts on the face and tear on the clitoris. No kind of consensual sex results in these kinds of injuries.
87. The flow of the evidence of PW2, the complainant was succinct and believable. The weapon of choice was a broken bottle that was found on the ground.
88. The court is enjoined to analyse both the prosecution and defence evidence before coming to a conclusion. In this matter the defence was stating that the sex occurred but it was consensual. I cannot thus ignore either evidence. This was well captured in the case of by J M Mativo, J, as he was then, in the decision of *Ndeka v Republic* (Criminal Appeal E007 of 2021) [2022] KEHC 3 (KLR) (19 January 2022) (Judgment) as doth:
12. A trial Court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It's a duty bestowed in every Court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every Court without exception.<sup>8</sup> The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused 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 and improbabilities.
13. The court is required to take 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.
89. Having perused the entire proceedings, I do not find any doubt that the sex was not consensual. The same was violently done. The state proved the case beyond reasonable doubt. The Appellant was convicted rightly. In the circumstances, each of the grounds failed. The evidence was cogent, and sufficient to the required standards. The court rightly considered the defence evidence and dismissed the same. The defence was untenable and not consistence with the happening on that day. There were no inconsistencies in the case.
90. The Appellant alleged inconsistencies and contradictions in the evidence proffered by the prosecution case and argued that the trial court failed in convicting him when the evidence tendered did not prove the offence against him to the required standard. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In *Joseph Maina Mwangi v Republic* CA No. 73 of 1992 (Nairobi) 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.”

91. For circumstantial evidence to work, it must be inconsistent with the accused’s innocence. In the case of *Abamad Abolfathi Mobammed and Another v Republic* [2018] eKLR, the court had this to say on circumstantial evidence:

“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 v 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.

92. The next question is whether the Appellant’s defence amounted to an alibi and could stand the test. It must be remembered that the burden of disproving an alibi is on the prosecution. In *Kiarie v Republic* [1984] KLR the Court of Appeal held:

‘An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.’

93. The alibi was not complete, since the sex occurred. It is thus irrelevant where the appellant was after the sex. Being in one club or another was after event and has no relevance to the case. The evidence thus to the effect that the Appellant was in Drips Night Club does not in any way affect the case. The conduct after depositing spermatozoa is irrelevant.

94. Secondly, the Appellant was the person with the Appellant that night. He left with her from the club. Subsequently his sperms ended in the complainant’s vagina, sanitary pad and underwear. These sperms were not on knapsack sprayer where they were poured to all and sundry. This was through penetration. He could not explain the presence of his sperms in the complainant’s vagina in a way that could upset cogent evidence tendered by the state. Section 111 of the *Evidence Act* provides with the burden of bringing the case within any exception or exemption as follows:

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

- (2) Nothing in this section shall-



- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

95. The Appellant took upon himself, the defence that the complainant was attacked by thugs. This was not proved. All the evidence leads irresistibly to the conclusion that only the Appellant and no one else had the opportunity and indeed did commit the rape on the complainant. There were no extenuating factors consistent with the Appellant lack of guilt. Both direct and circumstantial evidence point to only one perpetrator, that is the Appellant. The same also points to only one type of penetration, that is nonconsensual sex. The court finds this conduct consistent with guilt of the Appellant. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of *Abamad Abolfathi Mobammed and Another v Republic* [2018] eKLR, [P. Kihara Kariuki, PCA, M'inoti & Murgor, JJA] Court had this to say on circumstantial evidence:

“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 v 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.’”

96. It is sad that the appellant posited that there were personal views in the judgment. Having read the 51 one lined judgment, I do not find any personal issues in the judgment. The evidence on the case was not hypothetical but cogent. The case was proved beyond reasonable doubt. The question of consent was addressed in the case of *Republic v Oyier*(*supra*) where the Court of Appeal was of the view that:

Lack of consent was an essential element of the crime of Rape. The mental element is to have intercourse without consent or not caring whether the woman consented. To prove the mental element required in Rape the prosecution had to prove the complainant physically resisted, or that she was not in a position to decide whether to consent or resist. Here a woman yields through fear of death or through duress, it is rape.

97. In this case, it is clear that there was even no consent under duress. The complainant fought throughout, while trying to secure both her person and phone. There was no pretended consent to talk about. The complainant in evidence, which was believable and consistent with the other evidence on record, is that the appellant did not even try to seduce the complainant. He started with violence and ended up with rape. He did not even care about himself on being told that the victim was HIV positive. Not even menses, which started on 21.06.2022 could deter the penetration. I find the conduct of the appellant not only abhorrent but also cavalier.



98. Before I proceed with the issue on sentence, I have to note the tragedy I faced today as I wrote this judgment. I have three files. One is a robbery with violence. The young man stole 500/= and threatened to use violence. He was sentenced to death. He was in company of another but not armed. He was sentenced to death. Another, a 15-year girl went to her 19-year boy and lied to him that she was over 19. They had sex and it amounted to defilement. The boy is suffering 15-year imprisonment.
99. In this matter the appellant lured the complainant over a job, and violently beat her into submitting into crude sex at a time she was in her menses. This was an indignity no woman should undergo. He got a slap on the face. He will serve 15 years only. There is thus a need of legislative review to have all violent crimes suffer the same fate. It basically means that if any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of robbery. He will be sentenced to death.
100. On the other hand any person who penetrates another and at or immediately before or immediately after the time of penetration uses or threatens to use actual violence to any person is guilty of rape and shall be sentenced to 10 years. Such a disparity does augur well for the administration of justice. This appears to be the *raison d'être* why there is an increase in an astronomical way of femicide. It appears that criminals are more comfortable with rape and murder. The sentence for rape, especially a deterrent one is necessary. On the other hand, robbery is the most abused offence. It is akin to misuse of computer systems.
101. It is not lost on the court that any infractions amounting to just stealing is charged under robbery with violence. It cannot be that if one uses violence and ends up raping, he is assured of 10 years but if he only steals a purse from the same victim, he will be sentenced to death. Which of the two offences should attract more serious consequences? This does not mean that there are more violent robberies that one will deserve a death penalty.
102. The relevant authorities should rationalize the sentences for rape, grievous harm, defilement and robbery with violence. This is compounded by the directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) [K Koome, CJ, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, I Lenaola, NS Ndungu & w Ouko, SCJJ ] that tend to create murder as the darling of the law while sexual offenders and other capital offenders as children of a lesser god. The Supreme Court bench, differently constituted gave the following directions in regard to the decision of another bench:
- i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*.
  - ii. The *Judiciary Sentencing Policy Guidelines* to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
  - iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
  - iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
103. In the main case, *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment),



the Supreme Court [DK Maraga, CJ, PM Mwilu, DCJ & V-P, JB Ojwang, SC Wanjala, NS Ndungu & I Lenaola, SCJJ] held as follows:

Consequently, we find that section 204 of the *Penal Code* is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder.

For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

104. The people are concealing defilements by taking chances with murder. Parliament may need to make rape more deterrent than it is now. There also needs to be set degrees of robbery of violence. I was surprised that the director of public prosecution did not find it necessary to deal with the assault that was apparent.

105. The power of the court is limited as regards sentence. The appellant contended that the sentence imposed was manifestly excessive. L.N. Njuguna, sitting in Embu, in the case of *Makumbi v Republic* [2022], cited the Supreme Court of India's decision in State of *M.P. v Bablu Natt* [(2012) SCC 648], on the issue of evidentiary inconsistencies undermining the prosecution's case as follows:

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”

106. The first appellate court, cannot interfere with the discretion of the lower court. In the case of *DAO v Republic* (Criminal Appeal E021 of 2023) [2024] KEHC 7460 (KLR) (13 June 2024) (Judgment), W.A. Okwany posited as follows:

Sentencing is at the discretion of the trial court which discretion must however be exercised in accordance with set standards and principles of law. The High Court at *Kwa Zulu Natal in S. v Ncbunu & Another* (AR 24/11) [2012] ZAKZPHC6, stated that:

“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be...”

107. The sentence for rape is 10 years but can be enhanced to life. The court gave the Appellant 15 years. The Appellant has a record as per page 149 of the record. The appellant admitted the record. He mitigated on being in custody for a long time. The Appellant sought not to factor 50-year imprisonment as it is subject of an appeal.

108. The court must keep in mind that, it is the discretion of the court that is challenged in sentencing. That discretion must be judicious and not capricious or arbitrary. In other words the court must have considered relevant factors and not considered irrelevant factors. The court does not however deal with mundane or fringe issues since de minimis non curat lex, the law does not concern itself with trifles. In the case of *Wanjala v Republic* (Criminal Appeal E091 of 2021) [2022] KEHC 18042 (KLR) (6 October 2022) (Judgment) A C Mrima J Posited as follows regarding the principles upon which the first appellate court may act on when dealing with an appeal on sentence.



6. The court in *Wanjema v Republic* [1971] EA 493 laid down the general principles upon which the first appellate court may act on when dealing with an appeal on sentence. An appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.
109. The court relied on the mitigation, judiciary sentencing policy, violence used during the commission of the offence, age of the offender and duration in custody. The court used a record 9 decisions in arriving at sentence.
110. In the case of *Wanjema v Republic* [1971] EA 493, the Court stated as follows regarding interference with sentencing:
- The Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle, or the sentence is manifestly excessive in the circumstances of the case.
111. This being a sexual offence, the court is obligated and must have regard to the minimum sentences. The Supreme Court stated as follows regarding minimum sentences in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment):
57. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances....
66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.



112. The *raison d'être* for increased sexual violence appears to be lenient sentences for rape and very stiff sentences for defilement. A sought of effective equilibrium should be introduced including parity with violent robbery. It does not make sense to protect property more than human dignity and bodily integrity of the human race.
113. The court took into account that not only did the appellant rape the complainant but also used extreme violence on her. The court notes that the appellant lured a young job seeker to attend interview immediately, which ended in rape. I found it a poor sense of self-importance for the appellant to insinuate that the complainant called this upon herself. The complainant was raped while on her menses and left to die. It is only her pure energy and strength that made her enter into a church, and sought for help. If I had been sitting, I will have given a life sentence as the current sentence is very lenient. However, the court exercised its discretion. The discretion was properly and judiciously exercised. The sentence is lenient but lawful. Kneller, Hancox JJA. & Chesoni, Ag. JA in the case of *Wagude v R* (1983) KLR 569 posited that the Court may interfere with the sentence only if it shown that it was manifestly excessive. The sentence is consequently affirmed.
114. The upshot of the foregoing is that the appeal lacks merit and is accordingly dismissed. I note the court indicated that the sentence starts on 22.09.2022, the date of arrest. However, the Appellant is still serving sentence for other offences. That period has already been discounted. Consequently the 15-year sentence shall run consecutively with the sentences already being served.

### Order

115. The consequence upon the foregoing is that I make the following orders:
- a. The appeal on conviction and sentence is dismissed.
  - b. The date of commencement of sentence is set aside. The sentence shall commence after the sentences already given earlier.
  - c. There are two other offences and offenders including assault disclosed and for which the Director of Public Prosecution is entitled to study the file and deal accordingly.
  - d. The court laments that the prosecution was unable to have Tracy also face her own fate, but is not too late to act.
  - e. The sentence for rape is far removed from the sentence of robbery with violence in circumstances where violence is used as in this case. The Law Reform Commission should take up the challenge and align the law by providing for penalties commensurate with the amount and degree of violence used.
  - f. Right of appeal for 14 days.

**DATED, SIGNED AND DELIVERED AT NYERI ON THIS 21<sup>ST</sup> DAY OF JULY, 2025.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Kimani for the State

Nanjala for the Appellant

Appellant present



