REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 54 OF 2019

IDLE ABDI HARET...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction in Criminal Case No. 20 of 2018

in the Senior Resident Magistrates Court at Wajir Hon. Mugendi Nyagah Senior Resident Magistrate

dated 19th November, 2019)

JUDGEMENT

Introduction

1. The appellant was convicted for *rape* contrary to section 3 (1) (a) of the Sexual Offences Act No. 3 of 2006. He was sentenced to *ten (10) years* imprisonment. The particulars of the offence were that on 3rd November, 2018 in Habasweni sub-county within Wajir County the appellant intentionally caused his penis to penetrate the vagina of GAI a Somali female adult aged 18 years without her consent.

2. Additionally, the Appellant also faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the Sexual Offences Act, based on the same particulars**.**

3. The appellant has appealed against his conviction and sentence. The original petition of Appeal was filed on 23rd December, 2019. His Counsel Paul Mugwe Nyaga filed a Supplementary Petition of Appeal on 5th February, 2020. The grounds of appeal listed are: -

1) **THAT** the trial court erred in fact and in law by failing to find that the ingredients of rape were not proved on account of the evidence of prosecution witness contradicting the first report, which first report provides a good test by which the truth and accuracy of subsequent statements may be gauged.

2) **THAT** the trial court misconstrued and misapplied section 124 of the Evidence Act cap 80 by relying on the evidence of one witness, to wit, the complainant and at the same time failed to give reasons for believing her.

3) **THAT** the trial court erred in law by invoking section 124 of the Evidence Act and thereby relying on the evidence of the complainant despite the evidence having been impeached on account of being inconsistent and thus unbelievable.

4) **THAT** the trial court erred in law and in fact by failing to find that the evidence of PW5 was fabricated and created doubt on the entire prosecution case.

5) **THAT** the trial court erred in fact and in law by making a finding that the contradictions and inconsistencies in the first report and testimony of PW1, PW2, PW3, PW6 and PW7 did not go to the root of the case.

6) **THAT** the trial court erred in fact and law by failing to make an adverse inference on the prosecution case for failing to call crucial witnesses, to wit, a forensic expert to show that there was cellphone communication between the appellant and PW1 and informers who purportedly convinced PW8 that the alleged offence occurred in the house and not in the car.

7) **THAT** the trial court erred in law by shifting the burden of proof and erroneously faulting the appellant for not leading evidence

to show why PW1 would place DW5 at the locus in quo.

8) **THAT** the trial court erred in law and fact by accepting the prosecution case over the defence which consisted of plausible alibi.

9) **THAT** trial court erred in law and facts by not faulting the prosecution and investigating body for failure to investigate the defence of alibi which was submitted to the investigating officer upon arrest and before trial and again raised during defence hearing.

10) **THAT** the trial court erred in facts and law by failing to exercise doubt in the prosecution case in favour of the appellant, specifically, the laboratory results that were disowned by DW4 who was alleged to have authored the report by PW4.

11) **THAT** the trial court erred in law and in facts for failing to fault the investigator and prosecution for conducting a biased investigation and prosecution thus prejudicing the appellant contrary to section 4(b) and (f) of the ODDP Act No. 2 of 2013.

12) **THAT** the trial court erred in law and in facts by convicting the appellant on supposed deficiency of defence in place of affirmative proof of the Prosecution case.

13) **THAT** the trial court erred in law and facts in failing to find that the veracity of the medical records having been impugned, they could not corroborate the testimony of PW1 or be relied upon to arrive at a safe conviction.

14) **THAT** the trial court erred in law and facts in failing to find that by virtue of the maker and/or makers of the medical documents having not given his(their) name(s) and qualifications his(their) finding could not be relied upon to corroborate PW1 or to arrive at a safe conviction.

15) **THAT** the trial court erred in law and facts by failing to find that the prosecution had not proved the case beyond reasonable doubt.

16) **THA**T the trial court erred in law in failing to make a determination on the alternative charge.

17) **THAT** the trial court erred in law by failing to read out the options available to the appellant for tendering his defence contrary to section 211 of the Criminal Procedure Code.

Submissions

4. Parties agreed to dispose of the appeal by way of written submissions. The Appellant filed their written submissions dated 13th February, 2020 and filed on even date. The Respondent via Mlati State Counsel opted for oral submissions in which appeal was conceded. However, the complainant via Nyipolo Advocate watch brief filed their written submissions dated 12th February, 2020 and filed on even date. The matter came up for hearing on 20th February, 2020 when parties highlighted their submissions.

Appellant's Submissions:

5. The appellant in support of this appeal contend that the Prosecution in their case failed to prove the ingredients of rape. They went ahead and submitted on the following grounds in support of their case. The first issue addressed by the appellant is on the first report and subsequent variations. It is their submissions that the lower court failed to consider the impact of the contradictions in the OB report recording by the complainant and the subsequent testimony in court.

6. They submitted that OB report recorded on 4th November, 2018 produced in court alleged that the complainant was given a lift by the accused at around 3.30PM while she was coming from Bulla Juu heading to Bula Kibilay to visit her mother, and that upon entering the accused motor vehicle she fainted, and after two hours regained her consciousness finding herself around a borehole feeling pain at her private parts. She went home, and since her parents were not around waited until the next day when they came and she told them what had happened and she was taken to hospital and treated and later visited the police for assistance.

7. The appellant submits that the above report made to the Police contradicted the evidence tendered in court by the complainant PW1, PW2, PW3, PW5, PW7 and PW8 where they all told the court that the incident took place at DW5 house on 3rd November, 2018, this was after the accused duped PW1 vide a telephone call that he intended to revise with other candidates for exams, with the view of giving them leakage, he subsequently picked her along the road, took her to DW5 house, drugged her by throwing powder on her face and raped her.

8. It is their submissions that the report in the Occurrence Book of 3rd November, 2018 is further corroborated by the information in Exhibit 2, a General Outpatient record under history and physical examination which states that the *"the patient was well till 1 day ago at 2.30pm when she met someone well known to her, who gave her a lift in a taxi (personal vehicle)…In the process she fainted and when she woke up she found her clothes above her knees, there and then she knew she had been raped"*.

9. Additionally, they submitted that the explanations given by PW, PW8 and PW1 cannot be justified, this is in view of the authorities to the effect that a first report given to a person of authority form a basis upon which the truthfulness of subsequent statements or testimony by a witness can be gauged. In this they relied in the cases of **Terekali S/O Korongozi & 4 Others vs Regina [1954] EACA 259, Shazad & 2 others vs Republic (1988) KLR 282 286, Locholia Kwarok vs R (2018) eKLR, Duncan Mayodi Asenji v R (2016) eKLR** and **Ephantus Gakundi vs Republic (2017) eKLR.**

10. Further, the Appellant submitted that the complainant allegations that she was stupefied by the accused vide use of a powder was also not included in her report to the hospital, which information would have enabled the hospital to ascertain the same as 48 hrs. had not lapsed since the incident occurred, and therefore they allege that the complaint failed to give material evidence in the first instance, and therefore based on the inconsistencies in the OB report and the medical report, the rape incident cannot be true. In this they relied in the cases of **Clement Namulambi & Another vs Uganda C.O.A(U) Crim. App No. 1 of 1978 and John Mutua Munyoki vs Republic (2017) eKLR.**

11. The second issue addressed by the appellant is the alleged misapplication of section 124 of the Evidence Act by the trial court. It is their submissions that the trial court erred in convicting the appellant based on uncorroborated evidence of the complainant PW1, yet her evidence was full of contradictions which affects her truthfulness, they submitted that there are too many unbelievable stories in this case that border on fabrications and falsities, thus requiring corroboration and that the trial magistrate erred in believing the PW 1 evidence. In this they relied in the case of **Clement Namulambi & Another vs Uganda (supra).**

12. The third issue addressed by the appellant is on the failure of the medical documents to meet the veracity test, and in this regard it is their submissions that the medical lab report cannot be believable as the person who produced the same was not the author, that is PW4, and that the author of the report is unknown, this is also in view of the fact that the person who is alleged by PW4 as the author, that is one Erastus Ndunge (DW5) in his testimony as the defence witness denied being the author of the said lab report, even though he acknowledged the stamp thereon as emanating from the Habasweni health facility where they work.

13. The appellant submitted that the trial magistrate erred in filling the gap in the prosecution case on the lab report by finding that the said lab report emanated from Habasweni Hospital, instead of giving the appellant the benefit of doubt. In this they relied in the case of **Michael Mumo Nzioka vs Republic [2019] eKLR and Elizabeth Waithegeni Gatimu vs R [2015] eKLR.**

14. Additionally, they submitted that the fact that the subject medical report does not give the medical practitioners qualifications and experience raises the question on whether the author of the report had the necessary skills to undertake the task. In this they relied in the case of **Abdullahi Araye Weheliye vs Republic (2017) eKLR.** It is therefore their submissions that the medical reports herein stand impeached and cannot therefore be used to corroborate the evidence of PW1.

15. The fourth ground advanced by the appellant is on adverse inference, and in this regard they submitted that the trial court failed to find that the failure of the prosecution to call some witnesses meant that the court ought to have made a determination that their testimony would have been adverse to their case. In this case they submitted that the prosecution deliberately failed to adduce evidence or call witnesses who would have established whether indeed there were any prior communications between the appellant and the complainant. This they argue happened despite the appellant having handed over his phone for forensic analysis, which report they submitted was deliberately not produced and the crucial witness in this case one Amos Kuria who despite attending court was not called to give his evidence.

16. Additionally, they submitted that based on the above the court ought to have made an adverse reference as was held in the case of **Bukenya & others v Republic (1972) EA 349.**

17. The fifth ground advanced by the appellant is that the trial court failed to consider the appellant alibi as raised. They submitted that the appellant upon being arrested raised the defence of alibi, which position they submit is corroborated by the evidence of PW8 who was the arresting officer. PW8 told the court that he visited the hospital the appellant alleges he had attended on the material day, but the appellant submits that no evidence of the alleged investigation of the alibi was adduced. They submit that the appellant alibi was further supported by the testimonies of DW2 and DW3.

18. Additionally, they submitted that the trial court failed to take into account the appellant alibi finding that it was outweighed by the prosecution evidence, however it is their argument that the prosecution failed to thoroughly investigate the same, and that they ought to have invoked section 309 of the Criminal Procedure Code and sought more time to investigate when the appellant further raised the issue in their defence. And that the burden of proof of the same lied with the prosecution. In this, they rely in the cases of **Kimotho Kiarie vs Republic [1984] eKLR and Michael Mumo Nzioka vs Republic [2019] eKLR.**

19. The sixth ground advanced by the appellant is on biased investigation and prosecution. In this respect the appellant submitted that the Investigation and the prosecution in this case acted in a biased manner. The instances of biasness pointed out by the appellant incudes the Investigation concealment of OB 11 which is the initial report recorded when the complainant first made the report. It is their case that the police deliberately titled the said report as the ‘weather report’ with a view of concealing the evidence in view of the contradictions arising therein.

20. Additionally, they submitted that the failure of the prosecution to furnish the defence with the forensic examination of the appellant phone, which was available was made in bad faith and ought to be condemned. They submitted that in this case the prosecution acted with a view of convicting the appellant at all costs, which should not be the case as was held in **Michael Mumo Nzioka vs Republic (supra).**

21. The seventh issue addressed by the appellant is on burden of proof, where they submitted that the trial court in some instances shifted the burden of proof upon the appellant. For instance, the trial court questioned why the appellant did not give evidence on why the appellant did not give reasons impeaching the credibility of witnesses. They submitted that at all time the burden stay with the prosecution as was held in **Clement Namulambi & Another vs Uganda(supra).**

22. The eighth ground advanced by the appellant is on unreliable and conjured witnesses. In this case he singled out PW5 a tuk tuk operator whom they allege was coincidentally at the right place at the right time to witness the accused and the young girl alight from the motor vehicle near the house where the rape was allegedly committed. They submitted that the evidence of PW5 points to a conjecture and fabrications in view of the fact that he had alleged to have supplied goods to school where the accused was the Principal and had not been paid and therefore his evidence is out of bitterness and unbelievable.

23. Finally the appellant submitted that the trial magistrate failed to make finding on the alternative charge and disregarded the provisions of

section 211 of the Criminal Procedure Code, as the trial magistrate failed to inform the appellant of his rights to be informed of options of tendering his defence thus occasioning mistrial prejudicing the appellant.

24. In sum the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence.

Respondent Submission

25. On behalf of the State, Counsel Mr. Nyipolo submitted in opposition to the instant appeal. They addressed the following issues. They submitted that the prosecution in this case proved the ingredients of rape as provided for under section 3(1) of the Sexual Offences Act. In this case they submitted that the prosecution proved that there was intentional and unlawful penetration. They reiterated that the complainant PW1 testimony that the appellant forcefully pushed her into the house locked the door from inside, the drowning of her screams through increasing the television volume, physical assault, the application of a white powder on the complainant's face and the subsequent offer of examination leakage to silence the complaint. They submit all the above points out to circumstantial evidence that the penetration was forceful, and thus sufficient to warrant a conviction. In this they rely in the case of **Julius Kiunga vs Republic [2013] eKLR and section 43 of the sexual offences Act.**

26. Additionally, the respondent submitted that the act of forcefully pushing PW1 to the floor and later slapping her and thereafter using a powder to render her unconscious confirms that there was no consent and therefore this ingredient of the offence was proved.

27. Further, the respondent addressed the issue of discrepancy and inconsistency of evidence. In this regard they submitted that it is within the discretion of the court to determine the materiality of contradiction as was held in **Robert Peter Kazawali vs Republic [2018] eKLR,** and submitted that in this case the trial court exercised its discretion judicially.

28. Furthermore, the respondent submitted on the issue of adverse inference which the appellant allege that the court ought to have considered in view of the prosecution failure to call certain witnesses. In this case they submitted that the prosecution called witnesses who proved their case as was held by the lower court and that there is no requirement for the prosecution to call all witnesses as was held **in Reuben Shituli Lumisi vs Republic [2019] eKLR.**

29. Moreover, the Respondent addressed the issue of the appellant defence of alibi, and in this regard they submitted that the appellant raised the defence of alibi late into the trial, and in the circumstances it is not mandatory for the prosecution to investigate the alibi as the court would consider the alibi in view of the evidence tendered, and in this case they submit that the alibi did not displace the evidence tendered by the prosecution. In this they rely in the case of **Athumani Salim Athumani vs Republic [2016] eKLR.**

30. On the issue of the trial court failure to make a finding on the alternative charge, they submitted that the court is not obliged to make a finding on the alternative charge after it has entered a conviction on the main charge as was held in **Daniel Kimani v Republic(2018) eKLR.** In regard to the court failure to inform the accused of available options for tendering defence, the respondent invoked Article 159(2)(d) and urged not to consider the same and administer justice without undue regard to procedural technicalities.

31. Finally, the respondent submitted on the issue of sentence and told the court that the same was lawful and is the minimum allowed under section 3(3) of the Sexual Offences Act. In sum they urged the court to find the conviction and sentence lawful and proper and dismiss the instant appeal.

Evidence

32. The prosecution called a total of eight witnesses to prove its case. **PW 1,** GAI the complainant testified that she was 18 years old, and a resident of Habaswein. She told the court that on 3/11/2018 at 1.30PM the appellant who was the Principal of [Particulars withheld] Secondary School, where she schooled called her and invited her for a revision in preparation for their KCSE as she was a Form 4 student. It is her testimony that she left to meet the Principal and on the way she met him driving a probox motor vehicle. She entered the car and the Principal took her to some private house next to the AP camp. She stated that when they got to the said house, she saw her other teacher one YMI leave from the house they entered.

33. It is her testimony that when she entered the house she enquired where the other students were, but the principal allegedly pushed her forcefully, she fell down, the appellant locked the house and when she attempted to scream the appellant increased the TV Volume. She attempted to open the door but the appellant slapped her three times and removed a powder on his pocket applied on her face, she lost consciousness. She woke up a few minutes later and found out that her trouser and underwear had been removed and her dera raised and found some wetness on her private place, which wetness was blood. On asking the Principal what he had done, he promised to give her leakage in return of her silence. The appellant thereafter requested to drop her home; she agreed and was dropped near her home. At home she was alone, as her mother had attended some wedding and therefore there was no one at home to tell what had happened. She told the court that the following day on 4/1//2018 at 1pm her mother returned and she told her and his brother what had happened, they took her to Habaswein Sub-County hospital for treatment and they later went to the Police for assistance.

34. Additionally, it was her testimony that the appellant began calling her on 2/11/2018 using a Telcom number, where he introduced himself and asked if she could leave the house at night and she answered that she couldn't as she fears her parents. She denied being in a relationship with the appellant.

35. On cross examination, she was referred to OB 11 which was recorded on 4/11/ 2018, where it is alleged that she had reported that on the material while going from Bulla Juu to Bulla Kibiyai, she was offered a lift by the appellant and on entering the appellant probox car, she fainted and after two hours she regained strength but felt pain on her private parts, and found herself in an area near a borehole. She walked home and when her parents returned the following day, she told them what had transpired.

36. On being questioned on the contradictions between her earlier statement as recorded in OB 11 and the one she has told the court, she argued that the one she has told the court is the right one as she was still not in proper state of mind when the OB was entered. She reiterated that she was raped by the appellant.

37. **PW2 HOH testified that she is the mother of the complainant PW1.She recalled that on 3/11/2018 she attended a wedding and returned the following day on 4th November, 2018 when the Complainant notified her that she had been raped by the appellant; she took her to hospital and later to the police. Her evidence mostly covers a narration of what PW1 told the court.**

38. **PW3 MHS testified that he is the brother of the complainant. His evidence is similar to that of PW2, as he narrated what the complainant had told them transpired.**

39. **PW4 Reuben Okumo Ocke testified that he was a clinical officer based at Habaswein sub county hospital, where he had worked for over 7 years. He produced the P3 form and Outpatient records from Habaswein hospital allegedly prepared by one Ochieng whom they had worked together for over 7 years. He also produced the Laboratory report allegedly prepared by one Erastus Ndunge, a person they have also worked for a period of over 7 years and that he is able to identify their handwriting. It was his testimony that from the report, the complainant had narrated that she was raped by someone known to her. It was her narration that on 3/11/2018 while heading towards her father's house, she met someone whom she knew and she was offered a lift, in the process she fainted, and when she woke up she found out that her clothes were above her knees and she had been raped. On examination it was noted that bruises on the lower limbs and thighs, signs of vaginal penetration, bruises and blood. She was put on post exposure pills and emergency. He also identified the stamp of** Habaswein sub county hospital on the documents he produced.

40. On cross examination, he confirmed that the lab report was not dated, and that the same ought to not include the history of how the complainant was raped.

41. **PW5 Patrick Mwanzia** told the court that he is a tuk tuk driver operating within Habaswein. It was his testimony that he had interacted with the appellant on several occasions, as he would be sent to deliver things to him and also to the school in which the appellant was the Principal. He recalled that on the material day the alleged rape incident occurred (on 3/11/2018) he had dropped a client in some houses near the AP, where the alleged rape incident happened. He stated that he met the appellant and on further observation he saw him alight with a girl, he never suspected anything. It was after two days that he heard people rioting over a rape by a school teacher, on enquiry he was informed that it was the appellant who had committed the rape and, on his investigation, he connected to the events of 3/11/2018 and that is when offered to testify.

42. On cross examination he confirmed that at some point he had been sent from one Ibrahim Isack's hardware to deliver some items to the school where the appellant was the principal but he was not paid by the school.

43. **PW6 Hodhan Bashir Abdille** testified that she was a businesswoman at Habaswein town. It is her testimony that she owned the rentals where one YMI who was a teacher at [Particulars withheld] secondary school lived. She recalled that the said teacher YMI had lived in her rentals for over 3 years. She also confirmed she knew the appellant as the Principal of [Particulars withheld] Secondary school as she interacted with her frequently and that she had a daughter schooling in the school. Her evidence was to confirm that YMI lived in the said houses where the alleged incident happened.

44. **PW7 Ayub Soja** testified that he was a police officer attached to Habaswein Police station and was present when the complainant in company of others came to the station on 4/11/2018 at around 17.00, where PW1 told them that she was sexually assaulted the previous day by a person known to her, she told him that she was taken to a house where another teacher used to reside(teacher YMI). She complained of pain in her private parts and they took to hospital.

45. On cross examination, he was referred to OB No. 17 name Weather report', however, he said that the same was a mistake. On request of the defence he read OB 17/11/4/11/2018 which was recorded when the complainant first made the report. He read the said OB to the court as follow; -

> **"Report made in the station is one female Somali aged 18 years names GAI a student at [Particulars withheld] Secondary school and also a candidate of this year. She submits a report that yesterday about 3.30PM. When she was coming from Bula Juu to Bula Kibilay to visit her mother met a probox driven by a person well known to her namely Idle Abdi who is the Principal at that school. The one Idle Abdi offered to drop her in Kibilay but the moment the student entered into the probox she fainted. After 2 hours she gained her strength and found herself near a round borehole feeling pain at her private parts. After she was dropped, she went direct to her home and found that her parents were not around until today when she explained to them what happened yesterday. Her parents took her to Habaswein district hospital where she was treated and discharged."**

46. On the discrepancies on where the rape occurred, PW7 stated that indeed the OB report indicates that the rape occurred in the car, yet on further interrogation the complainant told them that it happened in a house. He confirmed that he was not the one who wrote OB 11 and OB 17. He confirmed the existences of two incidences and cannot tell whether the complainant lied on the first incident. Further, he told the court that the appellant brought himself to the station when he heard that the police was looking for him.

47. **PW8 Nathan Muia** testified as the Investigating Officer herein. It was his testimony that the Complainant made a report on 4/11/2018, that is OB 11, where she had told the court that she was offered lift by the appellant, entered the motor vehicle where she fainted and on gaining consciousness, she found herself in the borehole, with pain in her private parts, she walked home and since her parents were away , she waited until when they came back the following when she informed them of the incident, she was taken to hospital and to the police for assistance. He stated that he accompanied PW1 to hospital where P3 form was filled, where rape was confirmed. However, he did not have the complainant tested for the alleged chemical that was used to stupefy her.

48. Additionally, he told the court on further investigation, he found out that the rape incident happened in a house of one of the teachers by the name YMI who taught PW1 at [Particulars withheld] Secondary School, who was also a nephew of the appellant. It was his testimony that he first recorded PW1 statement on 4/11/2018 and further continued on 7/11/2018 and that it is clear that the complainant statement is fundamentally different from what was captured in OB 11.

49. In answer to the alleged difference in the complainant’s initial report vide OB 11 and the later statement, he stated that when PW1 first made the report, she was not fully conscious and was stammering. Further, he confirmed he made an error when he made reference to OB 17 which was titled a weather report, instead of the correct OB 11 which was related to the incident herein.

50. Moreover, he confirmed that the appellant when was arrested raised the issue of an alibi as he gave him his whereabouts, however, nothing was availed to support his claim. And that the appellant had alleged that at the material time he had gone to hospital with his wife, but produced nothing to prove the same. He also stated that he visited the alleged hospital but did not find any document to support the appellant assertions, and that the owner of the hospital was out of town when he made the visit. And that despite the appellant being out on bond he failed to produce documents or call witnesses to support his claim.

51. In sum, it was his position that he charged the appellant based on the evidence he gathered and more importantly the P3 form which confirmed that the complainant was raped, and more specifically it indicated that her vagina had bruises.

52. The appellant was put on his defence. He gave sworn evidence and called four other witnesses in support of his case. He testified as DW1, where he denied the allegations leveled against him. He told the court that on the material day that is 3/11/2018 when he woke up attended morning prayers, and stayed indoors until 4.30PM when he attended Alhamdu Nursing Home for treatment as he was unwell. He was in the company of his wife, and thereafter he went to a shop to buy foodstuff, and went back home at 5.30Pm and never stepped out again. He denied ever communicating to the complainant. This was until the following day on 4/11/2018 when he was called by the other fellow Principals within the area and was notified of the allegations. He was later summoned by the DCIO to attend to Habaseni Police Station; he complied and was arrested and charged. That is when he knew the complaint by the complainant and her allegations.

53. He admitted knowing one YMI, who was teacher in his school, however he denied knowing where YMI lived and that the allegations that he used YMI house to rape the complainant were false. He also confirmed that TSC has since interdicted him and deregistered him as a teacher.

54. Additionally, he told the court that the respective teachers were under a duty to assist the students in revisions for their KCSE exams but within the school compound as per the TSC rules. He also admitted that although mobile phones were not allowed in school, the same did not apply for day scholars.

55. In sum he denied the allegations leveled against him as a set up to prevent him from continuing as the Center manager in the school.

56. **DW2 Khatra Mohamed Ibrahim** is the appellant wife. She told the court that on the material day herein, that is on 3/11/2018 the appellant went for morning prayers a 6.00am, came back at 6.30am, they took breakfast together and at 1pm, he told them that he was unwell, she accompanied him to Alhamdu Hospital, She stated that they went to hospital after prayers, that is at 4.30pm. She reiterated that the appellant never left home between 1pm and 4.00pm. Thereafter they went to one Maina’s shop to purchase foodstuff and went back home at 5pm. On 4/11/2018 the appellant left home before 4pm and thereafter she heard about the allegations facing her husband. Additionally, she told the court that she is unemployed and depended on her husband as they have 4 children and expecting another.

57. On cross examination, she stated that she could not do anything to save her husband as she has gone to school and can always get a job with her finance certificate.

58. **DW3 Erastus Ndumia** testified that he is a lab technologist at Habaswein sub county hospital, where he has worked for over 10 years. He denied being the author of Exhibit 2 which is the lab report produced herein. He denied that the handwriting on the document were not his and gave the standard procedure in place when a client is referred. He told the court that it begins with a clinician sending a patient with a standard lab request form, where they fill the age, name, residency and inpatient number, the person who conducted the investigation, his designation and the date. In this case he stated that the document presented lacked all of the above.

59. On cross examination, he confirmed that the stamp on the document belonged to Habaswein sub county hospital and that the hospital has 6 lab technologists. He stated that he can’t remember where he was on 4/11/2018 and that the stamp can be prepared anywhere, he refuted the contents of the report because it does not have a name.

60. **DW4 SNN** testified that she is a student at [Particulars withheld] University, however during the material time in this case, she was schooling at [Particulars withheld] Secondary school and was being hosted by the appellant in his house. It was her testimony that on 3/11/2018 they were indoors with another candidate who was being hosted by the appellant, and that on that day the appellant left the house at around 4pm in the company of his wife telling them that they were heading to the hospital leaving them with the kids. Her testimony corroborates DW2 testimony, save as to the allegation that she knew the complaint and heard rumors that she had a boyfriend by the name A.

61. On cross examination, she stated that the appellant treated her well like a member of his family, however she does not owe him but she grateful for the assistance. She further noted that between 2pm and 4pm on 3/11/2018 the appellant was within his compound as they would see him outside with his wife.

62. **DW5 YMI** testified that he was a teacher at [Particulars withheld] Secondary school at the material time of this case, when the appellant who is his uncle was the Principal. He was a former student there but at that time he was teacher. He denied that the appellant used his house to commit the crime facing him herein, and that the last contact he had with him was on 26/10/2018, being the closing date, and that since KCSE exams were on, he could not access the school. He stated on 3/11/2018 he was around and at 12.30pm he left to his grandmother’s

house for lunch, as he was a bachelor. He denied that he left behind his house nor was he in contact with the appellant. And after vising his grandmother he went and watched football as it was a Saturday and came back to his house at around 9pm. And that he never believed that the appellant knew his house as he frequently met as he was his elder and boss and therefore used to visit him and his children.

63. Additionally, he stated that he knew of the appellant arrest and charges on 4/11/2018, where he visited him at the police but was unable to talk to him as he was in custody.

64. On cross-examination, he stated he was interdicted by TSC for allowing his house to be used for the commission of a crime by the appellant, and that he was arrested on 9/1/2019 and charged with the offence of conspiracy to commit a crime. He denied running away after the appellant was arrested and charged.

ISSUES AND ANALYSIS:

65. The duty of this court as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as was held in **Okeno v Republic (1972) E.A. 32** where the court held:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 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] E.A. 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 1978) E.A. 424."**

66. I have considered the Appellant's grounds of appeal, reviewed and reassessed the evidence adduced before the trial court and written and oral submissions for and against the appeal. The following are the issues that arise for determination in this appeal:

(a) Whether or not the contradictory evidence was material?

(b) Whether the prosecution failed to call key witnesses?

(c) Whether or not the Learned Trial Magistrate considered the Appellant's defence of alibi?

(a) Whether or not the contradictory evidence was material?

67. From the record, it is a fact that there were contradictions in this case. The complainant PW1 initial report made to the police on 4/11/2018 is different from what she told the court. She told the police that she was given a lift by the appellant at around 3.30PM while she was coming from Bulla Juu heading to Bula Kibilay to visit her mother, and that upon entering the appellant motor vehicle she fainted, and after two hours regained her consciousness finding herself around a borehole feeling pain at her private parts. She stated that she went home, and since her parents were not around waited until the next day when they came and she told them what had happened and she was taken to hospital and treated. This version of the allegation is also corroborated by the information in the General Outpatient record under the history and physical examination.

68. The Complainant in her testimony before the court gave a different version of what had transpired. She told the court that on 3/11/2018 at 1.30PM the appellant called her and invited her for a revision in preparation for their KCSE as she was a Form 4 student. She left the house and met the appellant on the way driving a probox, he entered and he drove to some private house next to the AP camp. It was her testimony that the appellant committed the crime in the said house after stupefying her.

69. The Investigating Officer in his testimony before the court admitted the contradictions in the initial report made and the later developments. It was his position that after investigations he found out that the rape by the appellant happened in a house and not in a probox as earlier alleged.

70. The manner of treating contradictions in a case were stated by the Court of Appeal in **Jackson Mwanzia Musembi Vs Republic (2017) eKLR where** the court cited with approval the **Ugandan case of Twahangane Alfred Vs Uganda, Cr. Appeal No. 139 of 2001 (2003) UG CA,6** where the court held that:

> **"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."**

71. Additionally, in **Joseph Maina Mwangi vs. Republic Cr. Appeal No. 73 of 1993** the Court of Appeal in dealing with the question of discrepancies in the evidence of the Prosecution and observed.

> **"The legal principle is that an Appellate Court in considering any alleged discrepancies and contradictions should be guided by the fundamental question, whether such discrepancies or inconsistencies, or contradictions caused prejudice or miscarriage of justice to the appellant on both conviction and sentence."**

72. In this case, the explanation given by the Investigating Officer (PW8) for the said contradictions was that the complainant might have been confused or unconscious when she made the report on 4/11/2018. This in my view does not hold in view of the fact that the alleged rape incident occurred on 3/11/2018 between 1.30pm and 3.30pm, and the report was made after 24 hours, that is the following day, and therefore the issue of the complainant being confused or unconscious does not suffice in the circumstances. Additionally, the complainant PW1 was accompanied by PW2 and PW3 when she made the report to the police, and nothing of this sort was alluded to.

73. Applying the above established principles of law on the effect of inconsistencies and discrepancies in a criminal trial, it is apparent to this court that this was the only material contradiction in this case, and that the issue was where the rape incident occurred. The trial court which had the opportunity to consider the demeanor of the witnesses reached a finding that the alleged rape incident occurred as narrated by the complainant in court, it adopted PW1 evidence in court, which position was also supported by PW8.

74. In view of the above, this court finds that the contradictory evidence herein was not material. This is also in view of the fact that the place of the incident was not being challenged by the defence, as the defence solely raised an alibi as their main line of defence. Be as it may, I find that the contradiction though apparent, it does not materially affect the prosecution case, as the critical question whether the complainant was penetrated or not and by who is not affected. In this case the complainant was clear in her allegation that the appellant was the culprit in both instances. Therefore, it is my finding that the appellant was not prejudiced in this regard.

(b) Whether the prosecution failed to call key witnesses?

75. The appellant contends that the prosecution in this case failed to call crucial witnesses and therefore the court ought to have made an adverse inference on the same. They submitted that the prosecution deliberately failed to adduce evidence or call witnesses who would have established whether indeed there were any prior communications between the appellant and the complainant. This they argue happened despite the appellant having handed over his phone for forensic analysis, which report they submitted was deliberately not produced and the crucial witness in this regard one Amos Kuria who despite attending court was not called to give his evidence. They submitted that the failure to call the said witnesses was fatal to the prosecution case and cited **Bukenya & Others vs Republic**.

76. Section **143** of the Evidence Act provides as follows:-

> **"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact"**

77. In **Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005** the Court of Appeal held as follows:-

> **"…As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

78. In **Bukenya & Others vs Uganda (1972) E.A.549** cited by the appellants counsel above where the East African Court of Appeal held that:-

> **i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.**
>
> **ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.**
>
> **iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be averse to the prosecution.**

79. Therefore, the adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. The question that stands out in this case is whether the evidence of one Amos Kuria was material. His testimony was allegedly concerning the analysis of the phone records of the appellant. It was meant to establish whether there was any communication between the appellant and PW1 prior to the alleged rape incident. It would reveal the nature of the communication between the Appellant and PW1 and give further credibility to the prosecution case.

80. A number of issues arise in this regard, for instance, what was the nature of communication between the appellant and the complainant? Did the forensic analysis of the appellant Phone point out an existing relationship with the Complainant and the appellant? Is it a coincidence that the complainant phone could not be analyzed on allegations that it fell on a toilet? Or is there a possibility that it was found out that there was no communication between the appellant and the complainant? These are the crucial questions relevant in this case. And which to date stands unanswered.

81. Assuming the forensic analysis had established some say frequent communication between the appellant and the complainant, the same would point out the existence of a relationship between the appellant and the complainant, and therefore doubts would arise as to the issue of consent.

82. The provision to **Section 124 of the Evidence Act** allows the court to convict on the sole evidence of a victim if it is satisfied that the victim is being truthful. In this case the truthfulness of the complainant herein has been put in doubt. This is in view of her contradiction in the report she made to the police and the testimony she gave in court. This being the case, more cogent evidence including the forensic

analysis of the appellant phone ought to have been produced in support of the prosecution case.

83. The trial Magistrate found that there was sufficient evidence implicating the appellant as the perpetrator of the offence. Failure to call a witness will only be fatal if the evidence tendered by the prosecution is insufficient to sustain a conviction and that there was need to call the witness to fill gaps. In this case there were gaps to be filled by the evidence of the phone analysis, which were deliberately not availed to the court.

84. In this case there not being any corroboration of the allegations of rape by the complainant, conviction may only be founded on a finding under section 124 of the Evidence Act, which conviction, this court finds unsafe. I find this ground of appeal as merited.

(c) Whether or not the Learned Trial Magistrate considered the Appellant's defence of alibi?

85. In this case, the appellant's defence was that of an alibi. The appellant alleges that on 3/11/2018 he was home, save for the time he attended mosque between 6.00am to 6.30am and being a Saturday he alleges that he stayed indoors until 4.30Pm when in the company of his wife he attended Alhamdu Nursing Home for treatment as he was unwell, thereafter they passed by a shop and bought foodstuff and left for home and he never stepped out until the following day the 4/11/2018. DW2 his wife testimony seems to corroborate this. Additionally, the evidence of D3 also is in support of the appellant alibi as DW3 stated that the appellant was home on 3/11/2018 between 1pm to 4.30pm.

86. The appellant submitted that the trial court failed to investigate and consider his alibi. They submitted that the appellant upon being arrested raised the defence of alibi, which position they submit is corroborated by the evidence of PW8 who was the arresting officer. PW8 told the court that he visited the hospital the appellant alleges he had attended on the material day, but the appellant submits that no evidence of the alleged investigation of the alibi was adduced. They submit that the appellant alibi was further supported by the testimonies of DW2 and DW3.

87. The trial court in its judgment reached a finding that the appellant alibi was raised late in the day and therefore the same cannot be believable, it went ahead to hold that the same does not displace the prosecution evidence. When the accused raises an alibi defence, it does not in any way mean that the onus of proof shifts to him but it always remains with the prosecution. All that the court needs to do is analyse the entire evidence on record and determine whether or not the alibi raised casts any doubt in the prosecution evidence.

88. The Court of Appeal in **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** noted that:

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

89. Where the defence of alibi is raised at trial and witnesses called by the defence, the prosecution will have an opportunity to rebut the same. section 309 of the **Criminal Procedure Code** states as follows:

> **"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."**

90. In the case of **Adedeji vs. The State [1971] 1 All N.L.R 75** it was held that:

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

91. In this case it is apparent that the prosecution was aware of the appellant alibi, which was raised at the time of arrest as per the

evidence of the Investigating Officer (PW8) who in his evidence stated that he visited the hospital in which the appellant had allegedly visited in the day of the alleged rape incident, but did not find the records as the person in charge was not in. The way the alibi defence was handled by the investigation officer was casual; it seems the prosecution ignored the alibi believing that they had strong evidence to displace the same, which position the trial court considered and convicted the appellant. Therefore, it is my finding nonetheless that the appellant alibi was considered.

Conclusion

92. In **Joan Chebichii Sawe vs. Republic [2003] eKLR** the Court expressed itself as follows:

> **"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt."**

93. It is clear from the foregoing that the conviction of the appellant herein raises some doubts. Acquitting the appellant of charges does not literally mean he is innocent, but it implies that the prosecution failed to prove their case beyond reasonable doubt.

94. The upshot of the foregoing, I find the appeal meritorious for the foregoing reasons and allow the Appeal.

95. Thus, the court makes the following orders: -

> ***i. The appeal is allowed, conviction is quashed, sentence set aside and appellant released forthwith unless otherwise lawfully held.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

....

C. KARIUKI

JUDGE