REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 62 OF 2019

NYANSERA JASPER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence by Hon. H. Barasa, SRM

delivered on the 13 June 2017 in Eldoret Chief Magistrate's Criminal Case No. 131 of 2016)

JUDGMENT

1. The appellant herein was charged before the lower court with the offence of rape contrary to **Section 3(1)(a),** as read with **Section 3(1)(c)** and **Section 3(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars were that on the **9 June 2016**, at Particulars Withheld] Village in Eldoret East District within Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the vagina of **SJ** by use of threats. The Appellant denied that charge, and after listening to and considering the evidence presented by the Prosecution, the learned trial magistrate was satisfied that the charge and all its ingredients had been proved beyond reasonable doubt.

2. Consequently, the Appellant was found guilty and was convicted of the offence of rape as charged. He was sentenced to 10 years' imprisonment on **16 June 2017**. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal on the following grounds:

(a) That the learned trial magistrate erred in both law and fact by failing to grant the case a fair hearing;

(b) That the trial magistrate erred both in law and fact by failing to hold that the issue of identification was not certified to secure a conviction;

(c) That the trial court erred in law and fact by failing to hold that the issue of penetration was not proved beyond any reasonable;

(d) That the trial court failed to hold that the evidence adduced by the witnesses was uncorroborated;

(e) That the trial court erred in law and fact by shifting the burden of proof to the appellant;

(f) That the trial court erred in law and fact by failing to hold that the whole matter was not proved beyond any reasonable doubt;

(d) That the trial court erred in law and fact by neglecting the evidence adduced by the appellant in his defence.

3. On account of the foregoing grounds, the appellant prayed that his appeal be allowed and the sentence reduced. He subsequently filed Amended Grounds of Appeal, and although no specific order was made herein granting him leave in that regard, I will nevertheless consider those grounds pursuant to **Article 159(2)(d)** of the **Constitution**, noting that no objection was taken thereto by Counsel for the State. The Amended Grounds are as hereunder:

(a) That the trial court erred in law and fact as it failed to observe that the charges were defective;

(b) That the learned trial magistrate erred in law and fact as he failed to grant the case a fair trial;

(c) That the trial court erred in law and fact as it failed to hold that the case was not proved beyond any reasonable doubt;

(d) That the trial court erred in law and fact as it failed to observe that the evidence was inconsistent and contradictory;

(e) That the trial court erred in law and fact as it failed to hold that penetration as an ingredient of rape was not conclusively proved;

(f) That the trial magistrate erred in law and fact as he ended up shifting the burden of proof to the appellant.

4. Thus, in his Amended Grounds of Appeal, the appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside. He relied on two sets of written submissions by which he raised and amplified the six Grounds of Appeal set out hereinabove. Thus, the appellant submitted, pursuant to Grounds 1 and 2 above, that the charge as laid was defective, in that the OB No. 5/11/6/16 which was reflected on the Charge Sheet did not tally with the OB No. 06/10/06/2016 that was reflected on the P3 Form. According to the appellant, the trial court was under duty to ensure that the evidence was consistent and to reject the same in the absence of an amendment properly sought under **Section 214** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya.**

5. The appellant complained that he was forced to remove his inner wear for the purpose of it being used as an exhibit in the case. In his view this was a miscarriage of justice and amounted to an infringement of his right to a fair trial under **Article 50(2)** of the **Constitution of Kenya**. He also complained about the manner in which **Dr. Rono** was stood down and replaced with **Dr. Eunice Timet** without any application being made in that regard. He relied on **Zahira Habibullah Sheikh & Others vs. State of Gujarat and Others** for the proposition that failure to accord an accused person a fair trial violates the minimum standards of due process of the law.

6. In respect of Grounds 3 and 4, the appellant submitted that it was an error on the part of the trial magistrate in not taking into account that penetration, a key ingredient of the offence of rape, was not proved. He discredited the medical evidence presented before the lower court pointing out that, according to the history presented in the P3 Form, the complainant had complained of assault and not rape. He urged the Court to find that, since the key finding was that the complainant had old and healed hymenal tears, no credible evidence of penetration was availed before the lower court to sustain the conviction for rape as there were neither fresh injuries noted nor the presence of sperms in the complainant's genitalia.

7. According to the appellant, it is a requirement under the **Sexual Offences Act** that both the complainant and the accused person be taken for medical examination to ascertain the true state of affairs regarding the allegations under that **Act.** He therefore submitted that the fact that he was not taken for medical examination ought to have worked in his favour. He relied on **Nakuru High Court Criminal Appeal No. 280 of 2014: Michael Odhiambo vs. Republic**, for the holding that it is the duty of the Prosecution and the court trying a sexual offence case to comply with **Section 36** of the **Sexual Offences Act** for purposes of DNA sampling and testing.

8. The appellant also took issue with the fact that the Prosecution failed to produce, as exhibits before the lower court, the clothes that the complainant was wearing on the date in question or the treatment notes she was issued with at the first instance. He also pointed out that not all the witnesses were called to testify, and questioned why, for instance, the father of the complainant and the area chief were not called by the Prosecution. He relied on **Joseph Njambi Karura vs. Republic** [1982-88] KAR 1165, **Nairobi HCCRA No. 364 of 2006: Peter Gitau Muchene vs. Republic** and **Criminal Appeal No. 1126 of 1984: John Kenga vs. Republic,** and urged the Court to draw the inference that, had the witnesses been called, their evidence would have been adverse to the Prosecution case.

9. Lastly, it was the submission of the appellant under Grounds 5 and 6 that, other than the contradictory nature of the Prosecution evidence, there was a shifting of the burden of proof by the learned trial magistrate, as the sum total of the Prosecution evidence fell short of proving the charge against him beyond reasonable doubt. The appellant cited **Criminal Appeal No. 45 of 1981: Richard Appella vs. Republic** for the holding that no contradictory statements ought to be admitted in a court of law as evidence of truth; and the case of **Ben Mwangi vs. Republic, Nairobi HCCRA No. 471 of 2001** on the importance of credible medical evidence in cases of this nature. He thus urged the Court to find that this was a frame-up and that that no rape occurred as alleged. He consequently prayed that his appeal be allowed and the sentence passed against him quashed.

10. The appeal was opposed by **Ms. Mokua,** Learned Counsel for the State. It was her submission that the offence of rape was proved beyond reasonable doubt, not only by the evidence of the complainant, but also by the medical evidence presented by **Dr. Eunice Timet (PW4).** On the issue of identification, **Ms. Mokua** urged the Court to note that there was a lengthy discussion between the complainant and the appellant before the incident occurred and that the appellant was well known to the complainant; the appellant having previously asked her to be his girl friend. Counsel discounted the perceived contradictions mentioned by the appellant, explaining that the variance in the OB numbers in the Charge Sheet and the P3 was a mere typographical error which did not occasion any miscarriage of justice. Thus, in her view, all the ingredients of the offence of rape were proved before the lower court beyond reasonable doubt.

11. I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

12. I note therefore that, before the lower court, the Prosecution called a total of 4 witnesses in proof the particulars of the charges. The complainant, **S.J.,** testified on **23 August 2016** and stated that she was on her way home from **[Particulars Witheld] Centre** and the time was about 4.00 p.m. when the appellant followed her and started a conversation with her. He had, on another occasion, approached her with a request for friendship and on this occasion was persistent in his desire to be her lover. **PW1**, who was still a student and was in the process of joining the university, was resolute in her rejection of the appellant's offer of friendship; and so the two parted ways and the appellant turned

back as if to go back towards the centre.

13. **PW1** told the lower court that, about twenty minutes later, as she was walking home, and after passing a river, someone suddenly held her from behind and started pulling her; and when she turned, she saw the appellant, with whom she had had a conversation earlier. She added that the appellant pulled her into the forest while holding her by the neck. There she forcefully undressed and had sexual intercourse with her; after which he threatened her with death if she revealed the incident to anyone. It was the evidence of the complainant that she went home and reported the matter to her mother, who immediately took her to **Moi Teaching and Referral Hospital** for examination and treatment. The following day, with the support of her father, she lodged a complaint in connection with the incident at **Naiberi Police Station**; whereupon the appellant was arrested and charged.

14. Before the lower court, **PW1** identified the inner wear that the appellant was wearing at the time of the incident, and which he was wearing at the time of his arrest; as well as the P3 Form that she was issued with at **Naiberi Police Station**. In cross-examination, **PW1** denied that there was any grudge between her and the appellant. She also denied that there had been a sale transaction of a mobile phone prior thereto which she had declined to honour, as suggested by the appellant.

15. The complainant's mother testified as **PW2** before the lower court. She confirmed that she had sent the complainant to **[Particulars Witheld] Centre** on **9 June 2016** at about 3.00 p.m. to buy some sugar; and that, when she returned at about 4.00 p.m. she was crying. She asked her what the matter was and the complainant reported to her that she had been raped on her way home. **PW2** also confirmed that she immediately escorted the complainant to **Moi Teaching and Referral Hospital** for treatment; and that, thereafter, the matter was reported to **Naiberi Police Station** and a P3 Form issued to the complainant, which was filled at **Moi Teaching and Referral Hospital. PW2** also confirmed that she was present when the appellant was arrested at **[particulars Withheld] Centre.**

16. **Cpl. Arthur Mbeja (PW3)** was the investigating officer in the matter. His evidence was that he was on duty when a rape incident was reported by the complainant. He confirmed that he issued her with a P3 Form and referred her to the hospital where the P3 Form was filled and the allegations verified by the examining doctor. Thereafter, he accompanied the complainant to **[Particulars Withheld] Centre** and arrested the appellant, who was identified to them by the complainant. It was further the evidence of **PW3** that, in her initial report, the complainant had furnished a description of the inner wear that the appellant was wearing; and that she was able to identify the same at the time of the appellant's arrest. He also stated that the complainant took him to the scene of the incident but that nothing was recovered.

17. The last Prosecution witness before the lower court was **Dr. Eunice Temet (PW4).** She testified on behalf of **Dr. Jane Yatich** who examined the complainant and filled her P3 Form. She explained that **Dr. Yatich** was no longer with **Moi Teaching and Referral Hospital**; and that having worked with her, she was conversant with her handwriting and signature. After recounting the findings and conclusions of **Dr. Yatich** as set out in the P3 Form, **PW4** produced the said P3 Form as an exhibit before the lower court. It was marked **the Prosecution's Exhibit No. 1.** The notable findings were that the complainant had redness and fresh injuries on the vagina, which were indicative of penetration.

18. On his part, the appellant told the lower court, in an unsworn statement of defence, that he used to sell mobile phones and credit cards; and that the complainant was one of their regular customers. As such, she would at times be allowed to purchase goods on credit. He further stated that on **20 May 2016**, the complainant asked him to give her a Nokia 1200 phone worth Kshs. 1,500/= on credit; and that she deposited Kshs. 500/= for it, leaving a balance of Kshs. 1,000/= which they agreed would be paid at the end of **May 2016**. It was further the contention of the appellant that the complainant failed to show up or pay the balance on the due date.

19. The Appellant further stated that, when he, perchance, met a female friend of the complainant on **5 June 2016**, he asked her to remind the complainant of the debt and ask her when she would pay him. That the complainant then showed up at their shop on **6 June 2016** looking angry and accused him of having defamed her in the eyes of her friends and customers; and that although he tried to explain his predicament, the complainant was not ready to listen. Instead she threatened him with dire consequences, which he would regret for the rest of his life. The appellant also mentioned that it was on this occasion that the complainant told him plainly that she would not repay the debt.

20. According to the appellant, on the **7 June 2016**, a police officer from Plateau Patrol Base went to his place of work and arrested him; and that he was neither told the reason for his arrest, nor the offence he had committed. He added that he thereafter got to learn that his arrest had been instigated by the complainant and her parents, who then demanded **Kshs. 20,000/=** from him to drop the complaint. He was thereafter charged with the offence of rape; an offence which he had not committed.

21. A perusal of the Judgment of the lower court shows that the learned trial magistrate correctly framed the issues for determination at pages 41 and 42 of the Record of Appeal. Thus, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal as well as the Supplementary Grounds are:

> (a) Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of rape to the requisite standard;
>
> (b) Whether the evidence adduced before the lower court proved beyond reasonable doubt that the Appellant was the perpetrator of the offence;
>
> (c) Whether the failure by the Prosecution to call some witnesses and the alleged contradictions mentioned by the appellant, were fatal to the Prosecution Case.

(a) <u>On whether the Ingredients of the Offence of Rape were proved</u>:

22. The offence of rape is a creation of **Section 3** of the **Sexual Offences Act,** which provides that:

"(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."

23. Hence, the Prosecution was under obligation to prove that there was penetration of the complainant's genital organ and that consent for such penetration was procured by force or by means of threats or intimidation. **PW1** recounted what transpired on the material date, pointing out that she was on her way home when the appellant suddenly accosted her from behind, held her by her jumper and dragged her into the forest where he forcefully had sexual intercourse with her. She stated that she did not consent to the sexual activity and that the appellant had held her by neck and threatened her with death if she dared scream; and that even after the incident, the appellant threatened her with dire consequences should she reveal the occurrence to anyone.

24. Credible evidence was presented before the lower court to prove that the incident was immediately reported by the complainant to her mother **PW2;** and then to the Police; and that the complainant was immediately taken to **Moi Teaching and Referral Hospital** on the same date of **9 June 2016** for prompt medical intervention. Hence, **PW4** testified that the complainant's P3 Form (the Plaintiff's Exhibit 1), was filled on **10 June 2016** by **Dr. Yatich;** that the complainant was found with old healed hymenal tears at positions 3 and 9 o'clock; and that the *labia minora* was erythematous. The doctor also noted that tests, such as HIV test, HVS, urinalysis and VDRL, were all negative. She also pointed out that no spermatozoa were seen in the samples taken from the complainant. Thus, **PW4** concluded that, on the basis of the findings, **Dr. Yatich** came to the conclusion that there was penetration.

25. I note that in his submissions, the appellant questioned whether the complainant was raped as a matter of fact. He impugned the medical evidence and pointed out that, according to the history presented in the P3 Form, the complainant had complained of assault and not rape. He therefore urged the Court to find that, since the key finding was that the complainant had old and healed hymenal tears, no evidence of penetration was presented before the lower court to sustain the conviction for rape. He added that, according to the medical evidence, there were neither fresh injuries noted nor the presence of sperms in the complainant's genitalia; which in his view was significant.

26. It is true that in Part I of the P3 Form, the brief details of the alleged offence were to the effect that the complainant **"…had been assaulted by one person known to her physically…"** Nevertheless, it cannot be said there that there is a contradiction in the history as given and the findings of **Dr. Yatich** as set out in Part II of the P3 Form marked the **Prosecution's Exhibit 1**. First and foremost, the word **"assault",** in common parlance, is a generic term that connotes any physical attack and therefore subsumes any physical attack of a sexual nature. Thus, in Black's Law Dictionary, Tenth Edition, the definition given for the word **"assault"** is:

"…The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; or popularly, any attack."

27. In any event, by means of the P3, the investigating officer sought expert opinion on the nature of the assault that had been meted out on the complainant; and therefore it is inconsequential that Part I of the P3 Form talks of assault as opposed to rape. As to whether or not there were fresh injuries observed by **Dr. Yatich**, it is manifest that the appellant misunderstood the medical terms used by **Dr. Yatich**, for she indicated clearly that the complainant's labia minor was erythematous; in other words, it was reddened. It was within that context that **PW4** could, and did say, that the complainant **"…had fresh injuries on the vagina which was highly suggestive of penetration…"**

28. It is therefore immaterial that the complainant was found with healed hymenal tears. It is, likewise, immaterial that no spermatozoa were found in the complainant's genitalia by the examining doctor. This issue was settled by the Court of Appeal in **Mwangi vs. Republic** [1984] KLR 595 thus:

"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."

29. I note too that the trial magistrate correctly directed himself on this particular issue and made reference to the case of **Andrew Apiyo Dunga & Another vs. Republic [2010] eKLR** for the holding that:

"That F was raped was confirmed by the medical report and there was no need to match the spermatozoa found inside her with that of each of the appellant as the offence of rape is complete once there is penetration of the female's genital organ with the male's penis. It is not necessary that spermatozoa be released. In this case the medical evidence confirmed that there was penetration of her vagina by a male organ…"

30. Hence, the conclusion that I come to in respect of the first issue is that there was cogent evidence before the lower court to demonstrate beyond reasonable doubt that **PW1** was raped on the **9 June 2016**, in that there was intentional and unlawful penetration of her vagina without her consent; and that she was subdued by means of force and threats of violence, including death.

(**b) On whether the Penetration was Perpetrated by the Appellant:**

31. n her evidence before the lower court, the Complainant pointed to the appellant as the culprit. She explained that, prior to the incident, she had been to **[Particulars Withheld] Centre;** and that on her way home, the appellant approached her and engaged her in conversation about his amorous interest in her. **PW1** testified that the incident occurred at about 4.00 p.m. and that she was resolute in her rejection of the appellant's advances. It is abundantly clear from the Prosecution's case that the conversation between the appellant and the complainant was a lengthy one; and therefore the appellant had sufficient opportunity to see the appellant well enough to be able to identify him 20 minutes later as the person who raped her.

32. The evidence of the complainant in this regard was corroborated by the respective testimonies of **PW2** and **PW3**. **PW2** in particular gave evidence that was entirely consistent with the complainant's; while **PW3** also mentioned that, in her report the complainant mentioned that she was able to see the innerwear the appellant was wearing which she duly identified before the lower court, and which was produced as an exhibit. Additionally, the fact that the complainant identified the appellant to the police the following day for purposes of arrest is also confirmation in itself that the complainant was ill as to who raped her. Hence, the appellant's assertion that he was framed was rightfully rejected by the learned trial magistrate in the circumstances.

33. The record of the lower court reveals that appellant was never subjected to medical examination, a routine part of investigations into cases of this nature. It was for this reason that he contended that it is a requirement under the **Sexual Offences Act** that both the complainant and the accused person be taken for medical examination to ascertain the true state of affairs regarding the allegations. He therefore submitted that the fact that he was not taken for medical examination ought to have been weighed in his favour by the trial magistrate. He relied on **Nakuru High Court Criminal Appeal No. 280 of 2014: Michael Odhiambo vs. Republic**, (supra) in which it was held that:

> **"…It is the duty of the prosecution and the court trying this case to clearly follow section 36 of the SOA No. 3 of 2006 which clearly stipulates that notwithstanding the provisions of section 26 of this act or any other law where a person is charged with committing an offence under this act the court may direct that an appropriate sample or samples be taken from the accused person at such a place and subject such condition as the court may direct for the purpose of a forensic and other scientific testing including DNA tests in order together with other evidence and to ascertain whether or not the accused committed the offence."**

34. It is however instructive that whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. It provides thus in **Subsection (1):**

> **"...where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."** (Emphasis added)

35. Hence, in **Evans Wamalwa Simiyu vs. Republic** [2016] eKLR, for instance, the Court of Appeal was of the view that:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."**

36. Similarly, in **AML vs. Republic [2012] eKLR** the Court expressed the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

(c) On the perceived contradictions and failure by the Prosecution to call some of the witnesses:

37. It is true that the father of the complainant was mentioned by her as being the person who escorted the complainant to the police station to lodge her complainant. He was not called as a witness. The area chief was also mentioned as having been present when the appellant was arrested. He too was not called to testify on the role he played in the matter. Accordingly, the submission of the appellant was that this omission was fatal to the Prosecution case. However, **Section 143** of the **Evidence Act, Chapter 80** of the Laws of Kenya, recognizes that:

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

38. Accordingly, in **Keter vs. Republic [2007] 1 EA 135**, it was held, *inter alia*, that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

39. Thus, as has oft been stated, the obligation of the Prosecution is to only avail such witnesses as are sufficient to establish the charge

beyond reasonable doubt. This point was underscored by the Court of Appeal in the case of **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** as hereunder:

> ***"The often-trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:***
>
> ***"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

40. Since the evidence shows that the arrest was made by **PW3** in the presence of **PW1** and her father, their evidence was sufficient as the fact of arrest was not in issue**.** Accordingly, I take the view that the failure by the Prosecution to call the aforementioned witnesses was not detrimental to the Prosecution case at all. The same would go for the failure by the complainant to avail the clothes that she was wearing on the date in question. I likewise find the discrepancy in the OB number as set out in the Charge Sheet and P3 Form an insignificant issue which was, in any case, attributed to a typographical error by Counsel for the State.

41. Clearly therefore, it is manifest that the trial court gave due consideration to the entirety of the evidence placed before it and came to a conclusion that cannot be faulted, granted the evidence on record, and the contention that the burden of proof was shifted from the Prosecution to the appellant has no basis at all. It is also manifest, at pages 41 and 43 that the appellant's defence was equally taken into consideration by the learned trial magistrate; and that all the tenets of a fair trial were adhered to by the trial magistrate. Thus, upon my re-evaluation of the evidence, it cannot be said that the case against the appellant was just a fabrication actuated by a grudge between the appellant and the complainant. While the Charge Sheet erroneously made reference to **Section 3(1)(a)(c)(3)** of the **Sexual Offences Act**, the appellant was not in any way misled thereby as the particulars were explicit enough.

42. In the result, I am satisfied that the conviction of the Appellant for the offence of rape under **Section 3(1**) was based on sound evidence. **Section 3(3)** of the **Sexual Offences Act** provides for a sentence of 10 years, which can be enhanced to life imprisonment. The Appellant was sentenced to 10 years' imprisonment. I have no doubt that his conviction and sentence was based on sound evidence and that the sentence was warranted. Accordingly, I find no merit in the appeal. I would dismiss the same in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY 2020

OLGA SEWE

JUDGE