REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO.93 OF 2019

JMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the Hon. E. H. Keago, SPM dated 5th day of August, 2019 in Machakos Chief Magistrate's Court in Criminal Case No. 193 of 2017)

REPUBLIC.....PROSECUTOR

VERSUS

KGW.....ACCUSED

JUDGEMENT

1. The appellant, **JMK**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 193 of 2017 with two counts.

2. The first count was that of ***Robbery with Violence Contrary to Section 296(2)*** of the ***Penal Code*** the particulars being that the Appellant, on the 31st day of March 2017 in Machakos sub county robbed **CK** of Kshs 10,000 and immediately before the time of such robbery wounded the said **CK**.

3. In count two, he was charged with the offence of ***Rape Contrary to Section 3*** of ***The Sexual Offences Act No.3 of 2006***. The particulars were that on 31st March 2017 in Machakos sub county intentionally and unlawfully caused his penis to penetrate the vagina of **CK** without her consent. He also faced an alternative count of ***Committing an Indecent Act with an Adult Contrary to Section 11(A)*** of the ***Sexual Offences Act***. The particulars were that on the 31st day of March 2017 within Machakos sub county intentionally touched the vagina of **CK** with his penis against her will.

4. After hearing, the Learned Trial Magistrate found that the offence of Robbery with Violence had not been proved. He however found that the offence of Rape against the Appellant had been proved and convicted the Appellant accordingly. He proceeded to sentence him to 8 years imprisonment.

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

1. That the Trial Magistrate erred in law and fact by not considering that the tendered evidence was hearsay.

2. That the Trial Magistrate erred in law and fact by not considering his defence which was brief and cogent.

3. That the Trial Magistrate erred in law and fact by not considering the contradictions and the inconsistencies which were in want of merit.

4. That the Learned Trial Magistrate did not even indicate when the sentence should start and therefore this Court should pursuant to section 333(2) of the Criminal Procedure Code consider the period spent in custody.

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

7. According to the complainant, who testified as PW1, on 31st March, 2017 at around 9pm, the accused who was well known to her, being her in-law and who was well known to her, went to Stage Bar where she was operating a bar and requested for a liquor brand known as "Jebel" which he complainant sold to him and the Appellant drunk the same. At around 11pm, the Complainant asked the Appellant to leave so that she could close the premises for the day and the Appellant obliged. On her way home after closing the premises, the Complainant found the Appellant standing by the roadside and the Complainant, apprehensive of her safety, decided to change her route. Upon reaching the home of PW2, she again found the Appellant at PW2's gate and the Appellant asked her what she was afraid of and the Complainant denied that she was afraid. The Appellant then hit her on the head and the chest and the Complainant started bleeding on the nose and the mouth. She screamed and fell down and felt the Appellant pulling her pants and removed it. She heard the voice of PW2 asking the Appellant what he was doing there and the Appellant stood and ran away, PW2 shouting at him that he knew him even if he ran away.

8. Upon placing her fingers in her vagina, she felt some mucus like substance and wetness. It was her evidence that PW2 was with his son, who escorted her home. The next morning, she explained to her daughter, **RN**, PW3, what had happened to her and the said daughter went to PW2's gate where she found a pair of torn pants after which she took her to Machakos Police Station where she recorded her statement and was escorted to Machakos Level 5 Hospital where she was examined and treated. She was later issued with a P3 form which was filled in. During her testimony, the Complainant stated that she had not fully healed and that she had lost vision in her right eye and was till attending medical treatment. It was her evidence that when she felt the Appellant pulling her pants, she felt him penetrating her vagina and penetrating her. She identified her brassiere, P3 form, pants, treatment documents and PRC form. It was her evidence that at the time of the incident she had with her Kshs 10,000/- in her jacket from the day's sales. She reiterated that she knew the Appellant very well and that their families had no differences.

9. In cross-examination, the Complainant stated that when the Appellant entered the Bar he was alone till 11pm as she did not usually have many customers hence they were only the two of them. Though she admitted having tasted a little alcohol, she denied that she was drinking that evening. She admitted that she passed out and temporarily lost her consciousness during the incident and found that her pants had been removed and felt watery fluid in her vagina and realised that she had been raped. It was then that she heard the voice of PW2.

10. PW2, **Joseph Ndungú Ileli**, a village elder testified that on 31st March, 2017 at around 11pm she was asleep in her house when he heard screams then all went quiet. However, his dogs started barking and he went towards his gate to check. Upon approaching a tree at the gate he saw a man standing whom he recognised as the Appellant, who was his neighbour but who lives about ½ km away across a river from him. The Appellant ran away but he told him that despite his running away, he had identified him. When his son, **K** heard him, he joined him and he saw a lady on the ground. When the lady stood up, he realised that she was his sister, the Complainant whose home was 200 metres away and who could use two routes. The next day they took the Complainant to the Police Station and later to Machakos Level 5 General Hospital after the Complainant informed him that she had been hit by an unknown object. It was his evidence that he did not know that the Complainant had been raped till the time they were in Hospital. Thought the incident was at 11pm. It was his evidence that there was full moon and security lights of the market whose illumination was just like daylight and he saw the Appellant clearly. It was his evidence that there was no disagreement between him and the Appellant.

11. In cross-examination he stated that he saw two people lying under a tree near his gate and that the Appellant stood up and when asked what he was doing, he ran away and he pursued him with the dogs and it was after pursuing him that he returned to check on the person who was lying down. According to him the Complainant's eyes were swollen and she had passed out.

12. On 1st April, 2017 at around 6am, PW3, **RN** a teacher at [Particulars Withheld], was at her home in Kaseve where she went to see her mother, the Complainant, who was living in the same compound but in a different house. Upon knocking on the Complainant's door, the Complainant faintly responded and as the door was not locked, she entered and found her asleep. She woke her up and saw that her face was swollen and blood was oozing. The Complainant then narrated to her what had transpired the previous night. When PW3 went to the scene, she found the Complainant's pair of panties and bra and after informing the neighbours she took the Complainant to Machakos Police Station in the company of one Mwanzia and one Kioko. After reporting the incident, they took the Complainant to Machakos Level 5 Hospital where she was examined and treated. It was her evidence that she knew the Appellant as a neighbour, not far from them and that they had never quarrelled.

13. PW4, **Dr. John Mutunga**, a Senior Medical Officer at Machakos Level 5 Hospital, testified that the Complainant's P3 form was filled in by his colleague, **Dr Katuse** with who he worked for 3 years before the latter left for further studies and whose handwriting he was familiar with. According to the said P3 form, upon examination, the Complainant's right eye was black (ecchymosis) swollen and oedematous and she had mild tenderness of zygomatic region. The injuries were three weeks old and it was postulated that the injuries were caused by a blunt object like a fist. On examination of the Complainant's genitalia, there were bruises on the external genitalia, and she had discharge from the swelling of her vagina. It was concluded that the Complainant had been raped and suffered maim and he exhibited the said P3 form.

14. He also produced a PRC form for the Complainant in which it was indicated that the hymen was not observed and the same injuries as reflected in the P3 form were repeated. From the CT Scan it was found that the Complainant sustained multiple facial bone fractures with soft tissue oedema.

15. In cross-examination the witness stated that the Complainant was found to have taken alcohol on 1st April, 2017 though the amount was not indicated.

16. PW5, **PC Purity Wamuyu**, the Investigating Officer, was on 1st April, 2017 asked by the Officer in Charge of Machakos Police Station to investigate the Complainant's case. She sent he Complainant to Machakos Level 5 Hospital for examination and treatment where she was issued with P3 form and PRC form. She also recorded the Complainant's statement. Later the Appellant was arrested and charged with the offence. She produced the pant, bra and P3 form as exhibits. It was her evidence that she visited the scene where there were street lights which enabled the Complainant to identify the Appellant who was well known to her and to whom she had sold beer on the night of the incident.

17. In cross-examination she explained that the street lights were 3 and ½ metres from the scene of the incident.

18. Upon being placed on his defence, the Appellant testified that on 9th April, 2017 he was at Kaseve Market at around 5pm when he saw two police officers who approached him and arrested him and took him to Kaseve Post from where he was later transferred to Machakos Police Station where he was booked for the instant offences after which he was charged with the same. He stated that he was not HIV positive and produced a medical report to that effect.

19. In cross-examination, he admitted that he was staying at [Particulars Withheld] Village but denied that he was known to the Complainant. He further denied that he was taking alcohol.

Determination

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

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

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

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

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

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

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

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

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

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

> ***"A person commits the offence termed rape if-***
>
> > ***a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;***

b. The other person does not consent to the penetration; or

c. The consent is obtained by force or by means of threats or intimidation of any kind."

26. I agree with the position adopted by **Mativo, J** in **Charles Ndirangu Kibue vs. Republic [2016] eKLR** that:-

> **"The word rape is derived from the Latin term *rapio,* which mean 'to seize'. Thus rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will." In other words, rape is violation with violence of the private person of a woman. A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under the Section 43 cited above. The sex must be against the will of the complainant. The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. The essence of rape is the absence of consent. Consent means an intelligent, positive concurrence of the 'will' of the woman. The policy behind the exemption from liability in the case of consent is based on the principle that a man or a woman is the best judge of his or her own interest, and if he or she decides to suffer a harm voluntarily, he or she cannot complain of it when it comes about. Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific sexual act…Consent may be either expressed or implied depending upon the nature and circumstances of the case. However, there is a difference between consent and submission. An act of helpless resignation in the face of inevitable compulsions is not consent in law.''**

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

> **"1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.**
>
> **2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**
>
> **3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."**

28. The Prosecution's case in summary was that on 31st March, 2017, the Complainant, a bar operator was serving the Appellant in her bar at Kaseve Market from 9pm to 11pm when she decided to close the bar and asked the Appellant to leave. After closing the bar, she was on her way home when she once again came across the Appellant on the way and being apprehensive, she decided to take a different route home. However, when she reached the gate of her brother, PW2, she found the Appellant there. The Appellant asked her what she was fearing and she responded that she was not afraid. The Appellant hit her with an unknown object and she fell down bleeding and screaming. She felt her pants being removed and the Appellant penetrating her and she apparently lost consciousness in the process. When she came to, she saw PW2 together with his son and when PW2 asked the Appellant what he was doing there the Appellant ran away but not before PW2 told him that he had seen him.

29. The Complaint was accompanied home by PW2's son and the following day, she narrated the ordeal to her daughter, PW3 who went to the scene and retrieved her pant and bra. She then reported the incident to the police and was later treated at Machakos Level 5 Hospital. Based on the report the Appellant was arrested and charged with the offence.

30. The first issue for determination is whether there was intentional and unlawful penetration of the genital organ of the Complainant. According to the Complainant upon coming to, she placed her fingers in her vagina and felt some mucus like substance and wetness. The Complainant was examined on 13th April, 2017 and it was found that her injuries were approximately three weeks old. Though it was in fact two weeks old, the age of the injuries being an approximated opinion, nothing really turns on that issue. When she was examined, she was found to have bruises on the external genitalia, and she had discharge from the swelling of her vagina hence the conclusion that she had been raped. In the case of **George Owiti Raya vs. Republic [2013] eKLR** it was found that:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane."**

31. In this case, both from the evidence of the Complainant and the P3 form, there was discharge from the Complainant's genitalia. Accordingly, there was evidence of penetration.

32. It was the evidence of the Complainant the sexual intercourse was not consensual.

33. The remaining issue is whether the said penetration was caused by the Appellant. That the Complainant and the Appellant knew each other very well is not in doubt. Not only were they well known to each other they were in fact related. On the material day, the Complainant and the Appellant were together in the Bar from 9pm to 11pm a period of some two hours. There was no one else in the bar. According to the Complainant on her way home she saw the Appellant on the wayside though the Appellant had left the Bar earlier on. Though she decided to

take another route, she again came across the Appellant who struck her, removed her pant and had sexual intercourse with her. Her screams attracted PW2 who went and saw the Appellant who ran away.

34. In his evidence, the Appellant did not explain his whereabouts on the day of the incident. While he was not under any obligation to do so, in my view where the prosecution's evidence is consistent and water tight, it requires a strong evidence to dislodge the same. This is not to say that the burden of proof shifts. What it means is that where the prosecution evidence taken on its own is strong enough to give rise to a conviction, unless some other evidence emanates from the defence which would have the effect of dislodging the prosecution case, there would be no reason to interfere with the conviction. In those circumstances it is then said the evidence of the prosecution proves the case beyond reasonable doubt.

35. However, even then the accused need only to raise reasonable doubt either by putting forward an affirmative defence or by raising doubt on the prosecution case. In **Mkendeshwa v Republic [2002] 1 KLR 461,** the Court of Appeal stated that;

> **"In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge."**

36. In this case, there was uncontroverted evidence that the Appellant was with the Complainant till late at night and they were only two of them. It was the Appellant who knew that the Complainant had closed for the day and he knew the route that the Complainant would take home being related to and well known to the Complainant. He did not deny that he was with the Complainant that night and did not bother to explain where he was. According to both the Complainant and PW2, the Appellant's home was across the river ½ kilometre away. He did not deny this. In those circumstances, the scales of proof were tilted in favour of the prosecution's version.

37. In his evidence, the Appellant even denied that he was known to the Complainant. Yet both the Complainant and PW2 testified that the Appellant was well known to them and according to the Complainant they were even related. The Court of Appeal for East Africa in **Rafaeri Munya alias Rafaeri Kibuka v Reginam [1953] 20 EACA 226** observed that:

> **"The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.**

38. The principle applicable was well explained in the court of appeal case of **Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990** as follows:

> **"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect". This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it`s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availably".**

39. According to PW2, on the night in question, there was moonlight and the place was well lit by security lights from the market which according to PW5 were 3 and ½ metres away. That a bright moonlight may well amount to sufficient light for the purposes of recognition was appreciated in **David Mwangi Wanjohi & 2 Others vs. Republic [1989] eKLR** where it was held by the Court of Appeal that:

> **"The quality of the evidence has to be considered. Does starlight afford a means of illumination for observing the shape or features of a person to such a degree that proof can be had beyond reasonable doubt, or is it a state of darkness richer in imagination than fact? There is no doubt that starlight *per se* affords no scientific means of illumination at all. It may purport that there was a clear sky, against which there might be seen the semblance of a human being. But it is not an assured basis, such as moolight, for observing the details of the features of a person."**

40. In this case apart from moonlight there were security lights nearby.

41. In these circumstances, the evidence relating to recognition of the Appellant was free from doubt and the inconsistencies alluded to by the Appellant are not such that they would upset the conviction. It was therefore appreciated by the Court of Appeal in ***John Nyaga Njuki & Others vs. Republic Nakuru Criminal Appeal No. 160 of 2000 [*2002] 1 KLR 77; *[2002] eKLR** *that:*

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."**

42. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

43. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

44. In **Erick Onyango Ondeng' v Republic [2014] eKLR**, the Court of Appeal held that:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

45. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

"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."

46. In **Joseph Maina Mwangi vs. 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."

47. Whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46**

48. In **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR** it was held that:

"As regards contradictions in the prosecution's case, other than the fact that the appellants did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example *Joseph Maina Mwangi v. Republic, CR, APP No. 73 of 1993, Kimeu v. Republic (2002) 1 KAR 757* and *Willis Ochieng Odero v. Republic [2006] eKLR)*…In this appeal, we are satisfied that there were no discrepancies of the nature that would have created doubt and vitiated the prosecution case."

49. The same Court in **David Rotich & Another vs. R. Nakuru Court of Appeal Criminal Appeal No. 75 of 1999** held that:

"We notice form the record that except for one, all the statements recorded by the police were made by the witnesses in the English language. In court, it is apparent most of them gave evidence in Kipsigis, their mother tongue. It appears to us that

what the police did was to record the statements in English while the witnesses might well have spoken to them in either Swahili or Kipsigis languages. We are unable to place any importance on the witnesses' police statements. In any case, those statements were before the trial court and the Judge and the assessors must have seen them, or had them brought to their attention. They still believed the evidence of PW1 and PW2 and there is no law, as far as we are aware, that where a witnesses' statement recorded by the police is in conflict with the evidence given by the witness in court, the evidence must of necessity be disbelieved. We have gone through the cross-examination of PW1, for instance, and we are unable to find any place at which PW1 was asked to explain the discrepancy between his police statement and his evidence in court. As we have said we do not think that the Judge and the assessors were wrong in believing the sworn testimonies of PW1 and PW2…The fact that one witness says he did not see another witness at the scene of crime does not and cannot mean the witness allegedly not seen was in fact not there. Both PW1 and PW2 were clear in their evidence that they saw these two appellants assaulting the deceased…Having looked at the whole of the recorded evidence, we are satisfied that these two appellants were correctly convicted. To be sure, there were some discrepancies in the evidence of the prosecution witnesses, but we agree with Mr Onyango Oriri, for the Republic, that the discrepancies pointed out did not go to the root of the prosecution's case. Indeed, they were the sought of discrepancies one would expect from unsophisticated village witnesses trying their best to recall events which took place some two years ago. Like the Judge and the assessors, we are ourselves satisfied, having independently examined the recorded evidence, that the witnesses for the Republic were basically honest and their evidence proved the charge against the appellants beyond reasonable doubt."

50. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

51. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."

52. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

53. I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

54. As regards the sentence, Section 3(3) of the ***Sexual Offences Act*** provides that:

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.

55. In this case the learned trial magistrate in line with a long line of authorities both from this Court and the Court of Appeal imposed a sentence of 8 years which I find no justification to interfere with.

56. In his judgement the learned trial magistrate while appreciating that the Appellant had spent two years in custody sentenced the Appellant to the said 8 years making reference to section 333(2) of the ***Criminal Procedure Code***.

57. Section 333(2) of the ***Criminal Procedure Code*** provides as hereunder:

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

58. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or

conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

59. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. *Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.* It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."** [Emphasis mine].

60. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

> **"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J*. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

61. According to ***The Judiciary Sentencing Policy Guidelines***:

> ***The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.***

62. In this case although the learned trial magistrate stated that he had taken into account the duration that the applicant was in custody, he did not indicate the date when the sentence imposed was to take effect. In the premises pursuant to the above, the only legal conclusion is that the sentence imposed is to take into account the period when the applicant was in custody.

63. From the record the applicant was arrested on 9th April, 2017 and though he was admitted to bail, he was in fact not released and was in custody the whole period up to and including the time of his sentencing. Therefore, while I find no reason to disturb the Appellant's conviction and sentence, I however direct that his sentence will run from 9th April, 2017.

64. It is so ordered.

65. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Judgement read, signed and delivered in open Court at Machakos this 14th day of October, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

The Appellant vide skype

Mr Ngetich for the Respondent

CA Geoffrey