REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 32 OF 2019

KELVIN GITHAIGA WANGÓMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of the Hon. J A Agonda, SRM dated 22nd March, 2019 in Mavoko Senior Principal Magistrate's Court in Sexual Offences Case No. 24 of 2015)

REPUBLIC.....PROSECUTOR

VERSUS

KELVIN GITHAIGA WANGÓMBE .....ACCUSED

JUDGEMENT

1. The appellant, **Kelvin Githaiga Wangómbe**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 24 of 2015 with the offence of rape contrary to section 3(1)(a) and 3(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of the offence were that the appellant, on the 13th day of November, 2015 at [Particulars withheld] Farm in Athi River sub-county within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of **JWK,** without her consent.

2. In the alternative the appellant was charged with the offence of Committing an Indecent Act with an Adult, the facts being that on the same day at the same time he intentionally touched the vagina of **JWK** with his penis against her will.

3. After hearing, the Learned Trial Magistrate found that the prosecution proved its case on the main charge against the appellant to the required standards, found him guilty as charged and convicted him accordingly. She proceeded to sentence him to 10 years imprisonment which was according to her the minimum sentence.

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

> **1. That the learned trial magistrate erred in law and fact in finding that the prosecution proved that the complainant's vagina was penetrated by a penis on the 13th November 2015, whereas there were doubts in the testimony of Ruth Leng'ete (PW3) as to the exact time the penetration occurred taking into consideration that the condom found in the complaint's vagina could have cause Urinary Tract Infection if it was in her vagina for at least 24 hours earlier.**
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> **2. That the learned trial magistrate erred in law and in fact in finding that the**
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> **3. Appellant did not challenge material aspects of the medical evidence tendered by the prosecution on issues of penetration.**
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> **4. That the learned trial magistrate erred in law and in fact and completely misunderstood the medical evidence presented and in her judgment, arrived at an erroneous finding equating penetration to rape.**
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> **5. That the learned trial magistrate erred in law and in fact in arriving at the conclusion that the Appellant is the one who penetrated the vagina of the complainant whereas there was no conclusive evidence to support the same in absence of D.N.A**

evidence, considering that the Appellant vehemently denied penetrating the complainant's vagina on the 13th of November 2015.

6. That the learned trial magistrate erred in law and in fact in finding that the complainant proved that the Appellant penetrated her vagina without her consent.

7. That the learned trial magistrate erred in law and in fact in failing to consider whether the conduct of the complainant before, during and after the alleged rape impliedly revealed that there was consent or indeed whether there was any sexual act.

8. That the learned trial magistrate erred in law and in fact in requiring the Appellant to rebut the testimony of pursuing the complainant whereas his defence was inconsistent with any pursuit of the complainant to engage in sexual acts.

9. That the learned trial magistrate erred in law and in fact in failing to consider whether the conduct of the complainant of returning to the same house where she alleged to have been raped and staying there for a week was inconsistent with the trauma associated with rape victims.

10. That the learned trial magistrate erred in law and in fact in failing to warn herself of the dangers of convicting the Appellant solely on the uncorroborated evidence of the complainant.

11. That the learned trial magistrate erred in law and in fact in finding that the Appellant did not challenge material aspects of the complainant's evidence on the issue of penetration and lack of consent.

12. That the learned trial magistrate erred in law and fact in finding that the complainant resisted the advances of the Appellant whereas the same was not proved to the required standard of proof.

13. That the learned trial magistrate erred in law and in fact in holding that the testimony of the complainant was not shaken whereas she could not tell if the Appellant was wearing a condom at the time of alleged rape.

14. That the learned trial magistrate erred in law and in fact in finding the evidence of the prosecution witness reliable whereas the same was inconsistent on material facts.

15. That the learned trial magistrate erred in law and in fact in failing to consider whether adverse findings could be drawn in prosecution's case due to the prosecution's failure to call Ann Muriuki as a witness.

16. That the learned trial magistrate erred in law and in fact in failing to consider whether adverse findings could be drawn in the prosecution's case due to the prosecution's failure to call the watchman who both the complainant and the Appellant confirmed was at the gate on the 13th November 2015.

17. That the learned trial magistrate erred in law and in fact in rejecting the Appellant's testimony in toto.

18. That the learned trial magistrate erred in law and in fact in requiring the Appellant to corroborate matter which were already admitted by the prosecution witnesses.

19. That the learned trial magistrate was biased and this led her to disregard the substance of the Appellant's submissions in toto.

20. That the learned trial magistrate erred in law and in fact in lowering the standard of proof in criminal cases in arriving at the conclusion that the prosecution had proved their cases against the Appellant.

21. That the learned trial magistrate erred in law and in fact in shifting the burden of proof upon the Appellant whereas there was no legal basis for the same.

22. That the learned trial magistrate erred in law and in fact in misapprehending the evidence tendered in the trial court.

23. That the learned trial magistrate erred in law and in fact in making her judgment based on the extraneous matters which prevented her from making a sound judgment.

24. That the learned trial magistrate erred in law and fact in failing to apply proper legal principles and thus arriving at a bad decision.

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

6. According to the complainant, who testified as PW1, on 13th November, 2015, the very day she had reported to work at the house of **Carolyne Wanjiru,** PW2, as the latter's househelp at Syokimau, at 1.00pm the appellant herein, PW2's son went to the house drunk and started caressing her. The appellant followed her to the bathroom where she was showering and continued with the same harassment while touching her breasts despite her protests. When she ran into the bedroom naked, the appellant followed her, prevented her from closing the

door, pushed her onto the bed, removed his trousers and, without her consent, had sex with her. According to her, that was her first day at her said place of work. However, at the time she reported to the house, the appellant was not present. According to the complainant during the assault, she did not shout since there was no one nearby who could assist her. After the incident the appellant left the bedroom and after 20 minutes she showered, called the person who had connected her to PW2, one **Anne Muruiki**, and informed her of what had transpired. On the advice of the said **Anne Muruiki**, she reported the matter to Mlolongo Police Station after which, in the company of the said **Anne Muruiki** and PW2, she went to Nairobi Women Hospital, Kitengela, where she was tested, put on medication and a condom removed from her vagina. She was issued with a Post Care Rape Form as well as a P3 form.

7. It was her evidence that she stayed with the appellant's mother for a week after which she left as she could no longer comfortably stay there. During this time the appellant was not staying at his mother's place as he had been chased away by her mother, PW2.

8. In cross-examination she admitted that had intended to withdraw the case in order for her to move on with her life.

9. PW2, **Caroline Wanjiru Maina**, the appellant's mother testified that she had employed the complainant as a househelp on 13th November, 2015. However, upon coming back from collecting her daughter's report card, she did not find anyone at home and on calling the complainant, the complainant informed her that she was at Mlolongo Police Station where she had gone to report that she had been raped by the appellant. Upon proceeding there, she found the appellant with their mutual friend, **Anne**, after which they proceeded to Nairobi Women Hospital, Kitengela where the complainant was treated and given medication and thereafter, they returned home. After the complainant left her home, the appellant, whose whereabouts were unknown to her, returned upon which PW2 called the police and the appellant was arrested.

10. In cross-examination she stated that the complainant had stayed with her for a few days before incident.

11. PW3, **Ruth Leng'ete**, a clinician at Nairobi Women Hospital, testified on behalf of her colleague, **Sylvia Sitati**, who was no longer at the facility. She produced a Post Rape Care Form filled on 13th November, 2015 for the complainant. According to the report, the complainant was clinically stable and there were no injuries seen on her general body. Her clothes were in good condition and there were no bloodstains seen. Upon examination of her genitalia, it was found to be normal though her hymen was broken and she has bloody vaginal discharge. She was sent for lab investigation and put on PEP and UTRA treatment. According to PW3, small laceration meant there was penetration or force was being used. Bloody vaginal discharge on the other hand meant force was used extremely during penetration causing trauma. According to the evidence, the complainant was not on her monthly periods and could not remember the last time she had them hence the discharged was not as a result of her menstrual. PW3 then produced the PRC Form as exhibit.

12. PW4, **Winfred Musembi**, a clinical officer at Athi River Health Centre examined the complainant on 16th November, 2015. According to her the complainant was 26 years old. On examination, there were no bruises on her genitalia and a condom was removed from her vagina which was produced as exhibit. It was found that the complainant's hymen was broken. In her view, the complainant was sexually assaulted and was already on drugs for urinary infection. She also produced the P3 Form as exhibit.

13. PW5, **PC Veronica Nthubo**, attached to Mlolongo Police Station was the investigating Officer. According to her, the complainant had worked for PW2 for four days. She recorded the statements from the witnesses including the complainant and in PW2's statement she disclosed that the appellant was on drugs and could have committed the offence. While the condom was removed from the complainant's vagina, the same was not preserved for investigation. Based on the report by PW2, the appellant was arrested on 20th November, 2015 and upon interrogation he admitted that he committed the offence under the influence of drugs though the admission was verbal.

14. Upon being placed on his defence, the appellant testified that the complainant was her mother's house girl though at the time of her employment he was living with his friend, one **Peter Gitonga**, in Syokimau. According to him, on 13th November, 2015 he met the complainant at his mother's house when he went visiting. On that day the complainant was washing clothes and he introduced himself to her. According to him, he had moved from her mother's house after they disagreed over his conduct. He then went to the kitchen to look for food and left the complainant doing laundry. After making the meal he went to the sitting room to take his meal while watching the TV. When the complainant came into the sitting room they struck a conversation during which the complainant informed him that she had financial difficulties and requested for financial assistance from the appellant in the sum Kshs 20,000.00 which the appellant informed her he did not have. When he declined to assist the complainant, the complainant threatened that she would accuse him of having raped her and that based on the strained relationship between him and his mother, his mother would believe her.

15. The appellant then got annoyed and stormed out. On 17th November, 2015 when he went back to pick his clothes, he found the complainant who informed him that she had reported the matter to the police and that if the appellant wanted the matter resolved, he should pay her Kshs 20,000.00. After showering and eating, he left the house after 40 minutes. When he returned to the house the following Friday at 6.00 am, he found his mother in the house who told him to go and sleep as he looked drunk. After two hours he heard his door being banged after which three police officers arrested him and took him to Mlolongo Police Station. According to him when he informed his mother what transpired on 13th November, 2015, his mother informed him that the complainant wanted Kshs 200,000.00 out which she had paid Kshs 100,000.00 and she would bail him out in order for him to go and sort himself out. According to him, his parents were estranged and his father was not living with them. According to him, he had disagreed with his mother who threatened to teach him a lesson unless he stopped drinking.

16. It was however, his evidence that he neither had sex with nor touched the complainant indecently and that he only greeted her at the laundry. He therefore denied that he confessed to the police that he had sex with the complainant since they never took his statement.

17. In cross-examination he admitted that he was supplied with PW2's statement, though the blackmail was raised for the first time in his evidence. He admitted that he was in the house on the day of the alleged incident. According to him he had one witness, one Tom, who passed away.

18. In her judgement the Learned Trial Magistrate found, based on the evidence of the complainant as corroborated by the medical evidence, that the complainant was actually penetrated/raped. According to her the said medical evidence was not challenged at all by the appellant in any material respect during cross examination. She also found based on the evidence of the complainant that there was no plausible reason not to believe the complainant's evidence that she had not consented to the sexual intercourse. As regards the identity of the assailant the Court found that the complainant's evidence that she was sexually assaulted by the appellant was similarly not materially challenged. The court found that the act was done in broad daylight hence the complainant had no difficulties in recognising or identifying the appellant.

19. As regards the appellant's defence, the court found the same unbelievable as it was not part of his case as could be seen from the line of cross-examination adopted by him.

20. Before me, it was submitted on behalf of the appellant that the learned trial magistrate should have warned herself of the dangers of convicting the Appellant on the uncorroborated evidence of the Complainant. In this regard the appellant relied on the Court of Appeal case of **Bernard Kebiba vs. Republic [2000] eKLR**.

21. In the present case, it was submitted, the learned trial magistrate at no point warned herself of the dangers of convicting the Appellant solely on the evidence of the complainant. Indeed, the court does not expressly indicate how the complainant's evidence was corroborated, if at all. The appellant relied on the Court of Appeal's decision in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR**.

22. In the present case, it was submitted, there was thus failure of justice since the learned trial magistrate convicted the Appellant on the primary evidence of the complainant who was an unreliable and incredible witness. The appellant further relied on the Court of Appeal case of **John Mutua Munyoki vs. Republic**.

23. In the present case, it was submitted that whereas the court stated that it believed that the Complainant was telling the truth, no reasons were advanced as to why the court believed the complainant. According to the appellant, the Complainant was not a credible witness. While she testified that she had worked in PW2's house only on the 13th November 2015, PW2 testified that she had stayed with her "for a few days." It was the testimony of the Investigating Officer (I.O.) that the Complainant had worked for PW2 for four days. This inconsistency, it was submitted, is glaring and there was no attempt to reconcile the evidence of the three witnesses. It was also noted that while PW1 and PW2 testified that the Complainant continued living in the aforesaid house for a week, the I.O. testified that the Complainant went to the house to pick her belongings. To the appellant, it is not realistic that one would take a whole week to collect her belongings. This again puts to question the credibility of the prosecution witnesses. It was his humble submission that the Complainant was aware of how unreasonable it was for her to continue living in the same house where she alleged to have been raped. She therefore lied to the I.O. to avoid any eyebrows being raised why she continued living in a house where the so called rapist could visit without any restrictions since it was his mother's house.

24. According to the appellant, the I.O. testified that she did not know that there was a watchman at the gate. This is notwithstanding that the Complainant in cross examination stated that there was a watchman. This means that the Complainant hid this crucial evidence from the I.O. since she was aware it could not support her story. It also means that the police did not investigate the offence by seeking out other witnesses who would have vouched to the complainant's story. While the I.O. testified that the complainant tried to scream but the appellant overpowered her, it was the complainant's testimony that she could not shout because there was no one at home. Apart from a clear contradiction in the evidence of the two, the explanation by the complainant does not demonstrate normal behaviour of one in danger. It was submitted that screaming is a spontaneous reaction if one is in danger and does not depend on the presence of a helper. Indeed, it is the screaming that would attract any possible helper.

25. It was contended that the complainant testified that he saw the Appellant for the first time on the day she was raped and that the Appellant was drunk. There was no evidence of any struggle and the complainant herself does not describe any form of struggle, merely that she told the Appellant "to stop". It was therefore submitted that the complainant's behaviour is inconsistent with one in danger particularly in view of the fact that her aggressor is said to have been drunk. It is inconceivable that an able bodied sober adult would be unable to ward off an intoxicated stranger intent on causing her harm. This also raises the issue as to whether the Appellant was then so intoxicated as to be unaware of his actions or the adverse effect of such actions, a possibility the trial court did not explore. In this respect the appellant relied on the case of **P M M vs. Republic [2017] eKLR**.

26. Applying that reasoning to the facts of this case, it was submitted that the Complainant failed to tell for those 5 minutes she alleged to have been penetrated, whether the Appellant was wearing a condom. She also did not explain exactly how and when the Appellant removed his trousers. The Complainant did not suggest that there was any struggle during the said five minutes. Neither does she give vivid details of the sequence of the alleged rape merely stating……" *He had trousers and shirt. He removed his trouser and raped me*. The Complainant therefore failed to prove penetration on 13th November 2015.

27. According to the appellant, the trial magistrate in her judgment stated that the appellant removed his trouser "and underwear" at the bedroom. There was no mention of any underwear throughout the prosecution evidence. This conclusion is also contrary to the complainant's testimony that the appellant ''unzipped" his trousers when he started caressing her. According to her, the appellant started caressing her when both were in the sitting room. It was therefore submitted that the inconsistencies pointed above depict the complainant as a liar and thus an unreliable witness. Reliance for this position was placed on **Nathan Browne Birundi vs. Republic [2007] eKLR**. Based on the case of **Ndungu Kimanyi vs. R [1979] KLR 283,** and the Court of Appeal in the Case of **Patrick Mwai Thuo vs. Republic (UR) Criminal Appeal No. 26 of 1987** it was submitted that inconsistencies should therefore have been resolved in favour of the Appellant.

28. To the appellant, the same reasoning is applicable herein. The inconsistencies should therefore have been resolved in favour of the Appellant. The conviction was thus unsafe in light of the facts of this case.

29. It was further submitted that **Ann Muriuki** who was the first person to be called by the Complainant after the alleged sexual assault was not called as a witness notwithstanding that she accompanied the Complainant to the police station and was interrogated by the Investigating Officer.

30. The Appellant having tendered sworn evidence of a fabricated prosecution case anchored on the Complainant's testimony also leads to the question of whether **Ann** knew the Appellant or even whether such a person existed. The fact that **Ann** did not offer the Complainant alternative housing after the alleged rape also leads to the question of whether she was aware that the Complainant continued to live in the same house and if so, why she was comfortable with that arrangement. Notably, it is the Complainant's testimony that **Ann** advised her to "*leave the house and go report at the nearest police station.''* **Ann** even inquired as to whether the complainant had taken a shower. It was therefore submitted that the allegation by the Investigating Officer that she had no way of bringing Ann to court notwithstanding that the prosecution had the option of seeking witness summons, is unfounded.

31. The presence of the watchman at the gate named by the Appellant as Tom took center stage in the trial court. Both the Complainant and the Appellant confirmed that he was at the gate. He was also the closest person at the scene. His testimony was crucial in shedding light on the appearance of the Complainant just after the alleged offences were committed. It would also have shed light as to whether the complainant had the opportunity to escape or seek help in light of the alleged aggression. He would have explained the setting of the house particularly the possible exits. His testimony would also have explained why the complainant did not seek his help during the attack (how far was he?) and even after the alleged rape. This is especially so in view of the complainant's testimony that after the alleged rape, she saw the appellant *"heading outside the gate."* This means that the gate was not far from the house. The Investigating officer does not seem to have been keen to get this crucial witness claiming that she did not know that there was a watchman. In this regard the appellant relied on the case of **J K vs. Republic [2018] eKLR.**

32. In the present case, it was submitted that the watchman was not by the road as the case cited hereinabove, but at the gate which means his testimony would have gone as far as indicating whether he heard any struggle in the house. Despite the I.O. in her testimony stating that she did not know there was a watchman at the gate, the Complainant had testified months earlier that he was there. She therefore had adequate opportunity to bring him to court. The prosecution preferred to consider the evidence tendered against the appellant to be sufficient instead of availing Ann and the watchman. The prosecution therefore failed in its duty of availing all material witnesses before the court.

33. It was contended that though the Appellant testified that Tom (the watchman) had died during the pendency of the case, the Prosecution had more than adequate time to call the said watchman as a witness. The same cannot be said of the Appellant who was placed on his defence after the death of Tom. The court was therefore urged to infer that the evidence of the two witnesses would have been adverse to the prosecution case especially in light of the testimony tendered by the appellant. In support of our submissions, reliance was placed on the case of **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** and **Gabriel Kimuhu Kariuki vs Republic [2003] eKLR**.

34. According to the appellant therefore, the failure by the prosecution to call the said witnesses should be interpreted to mean that the evidence of the two witnesses would have exonerated the appellant.

35. According to the appellant, upon cross examination of **Ruth Lengete** (PW3) she stated that a Urinary Tract Infection (UTI) takes 24 to 72 hours to form and that the condom removed from the Complainant's vagina might have caused the Urinary Tract Infection. The Complainant stated in cross examination that she could not tell whether the Appellant was wearing a condom. From the testimony of both witnesses, it was uncertain when and how the condom found its way to the vagina of the Complainant. It was submitted that the Complainant's failure to ascertain whether the Appellant was wearing a condom meant that there was a very significant gap in the prosecution case which rendered the Complainant's evidence unreliable. In his view, the possibility that the alleged penetration took place one or two days prior to 13th November 2015 cannot be ignored after considering the evidence of **Ruth Leng'ete**. The fact that the Complainant did not suggest that the Appellant had raped her the previous day or the day before shows that the Complainant had to prove that penetration occurred on 13th November 2015. This submission was based on the case of **Gerishon Gichera Muremi vs. Republic [2017] eKLR** and **Daniel Kiplimo Cherono vs. Republic [2014] eKLR.**

36. Since the Complainant testified that she was not a virgin, it was submitted that the absence of the hymen did not therefore create an inference that it was broken on the 13th November 2015.

37. As to the identity of the aggressor, it was submitted that that was a task that the prosecution failed to prove since first, the Complainant was not a virgin. Since she could not explain when and how the condom got into her vagina coupled with Ruth Lengete's medical opinion that there was a possibility it was present 24 to 48 hours earlier to have caused the UTI, the prosecution was faced with the task of showing that the alleged penetration was by the Appellant and nobody else on 13th November 2015 and without the Complainant's consent. The testimony of Ruth Lengete led to the possibility that the condom may have found its way to the Complainant's vagina prior to 13th November 2015. Since the Complainant complained of rape by the Appellant on 13th November 2015 only, there was a possibility that another person was responsible for the origin of the said condom. It was thus necessary for the prosecution to link the alleged penetration to the Appellant.

38. It was also contended that there was no attempt to link the condom or the contents thereof to the Appellant. Indeed, the Investigating Officer pointed out that the said condom was not preserved for investigation. No tests were carried out on the contents of the condom. The complainant was not subjected to a High Vaginal Swab (HVS) to collect traces of sperms that may have been present on her genitals at the time she sought medical attention. The appellant was also not subjected to any medical tests to match his fluids to those found on the complainant or *in* the condom. PW3 in cross examination testified…*"if there was any intercourse, there would be some fluids…."*

39. To the appellant, the medical investigation in this case fell short of standard procedure recommended in collecting evidence in a case of rape and in this regard the appellant relied on ***Merck Manual Professional Version on Medical Examination of Rape Victims***, in which it is recommended that several laboratory tests be carried out to detect presence of sperm. Faced with this void, it was submitted that the medical evidence fell short of proving that the Appellant committed the offence and that it is doubtful as to whether the complainant engaged in any sexual activity on 13th November, 2015.

40. It was further noted that medical evidence tendered was to the effect that there was a small laceration on the outer genitalia. The exact spot of the laceration has not been identified. However, since the complainant testified that she did not feel any pain, it was submitted that if there was forcible sexual intercourse, there would be bruises all over the complainant's genitalia particularly on the *labia minora*. The penis, while penetrating the vagina would cause bruises on the whole entry area particularly if the force goes on for five minutes as alleged.

Notably, PW4 testified that there were no bruises on the genitalia. No report of tenderness was made in the PRC. According to the appellant, since penetration was surrounded by uncertainty, the prosecution had the burden to show the essential link between the penetration and the Appellant and reliance was placed on the decision of the Court of Appeal in the case of **David Kuria Mwarangu vs. Republic [2014] eKLR**.

41. According to the appellant, the learned magistrate throughout her judgment analysed the testimony of the prosecution witnesses in isolation and arrived at a conclusion without considering the evidence of the Appellant. Thereafter, she required the Appellant to rebut her earlier conclusion arising from her analysis of the prosecution case. It was submitted that a look at her judgment shows that only the evidence of the prosecution witnesses was considered and that she arrived at a conclusion that the complainant was penetrated/raped without considering the testimony of the Appellant at all. To her mind, the Appellant could only challenge the testimony of the prosecution witnesses through cross examination.

42. It was submitted that the learned trial magistrate by considering the evidence of the prosecution witnesses first and in isolation and thereafter arriving at a provisional conclusion without considering the Appellant's testimony, lowered the standard of proof in criminal cases which is beyond any reasonable doubt. The court had the duty to look at the evidence of the prosecution and the Appellant as a whole and not separately. In support of his submissions, the appellant relied on the Court of Appeal case of **Nguku vs. Republic [1985] eKLR**.

43. It was submitted that the learned trial magistrate failed to consider the Appellant's testimony that there was a grudge between him and her mother hence the charges. It is to be noted that the Appellant's mother actively participated in the prosecution of the appellant. She joined the complainant at the police station, recorded a statement and took the complainant to hospital (without police escort) and accommodated the complainant for a week after the alleged offence. She followed up until she got the medical documents in regard to the offence, several days after the date of the alleged offence. In fact, she is the one who called the police to arrest the appellant. She then proceeded to testify against the appellant. She even told the police that the appellant was on drugs and therefore he could commit the offence yet the police could not find any drugs. Instead of considering this glaring conspiracy, the learned trial magistrate shifted the burden of proof upon the Appellant to prove his innocence.

44. It was submitted that simply put, the learned trial magistrate did not give any consideration to the sworn statement of the Appellant since he failed to call witnesses(s) to corroborate the same. The Appellant in the circumstances failed to prove his innocence. Indeed, the trial court did not at all consider the submissions filed on behalf of the appellant and did not refer to any part of the said submissions. She thus dismissed the defence in its entirety. In this regard reference was made to the Court of Appeal in the case of **Dorcas Jemutai Sang vs. Republic [2018] eKLR**.

45. In the appellant's view, the same reasoning is applicable herein. It was his position that the court had a duty to test the defence and in weighing it with all the other evidence to see if the Appellant's guilt was established beyond all reasonable doubt but failed to test his evidence at all. The prosecution also had the opportunity to invoke section 212 of the ***Criminal Procedure Code*** to call evidence to rebut the Appellant's testimony. Having failed to call for evidence in rebuttal, the Appellant offered a defence which cast serious doubts on the prosecution case. The threshold of proof set in criminal cases was thus not attained. In its submissions reliance was placed on the case of **Victor Mwendwa Mulinge vs. Republic [2014] eKLR**.

46. In this regard the appellant cited section 212 of the ***Criminal Procedure Code*** and contended that no negative inference should therefore have been drawn on the Appellant since the prosecution had avenues to rebut the Appellant's testimony and they opted not to do so. Since the prosecution could not prove their case against the Appellant to the required standard, the learned trial magistrate is seen to have felt it safe to convict the Appellant on the fact that the Appellant was fairly and squarely placed at the scene of crime. She thus strongly suspected that the Appellant committed the crime. Although there was no direct link between the alleged rape to the Appellant, the court felt it safe to convict the Appellant merely on strong suspicion. It was his submission that suspicion however strong cannot lead to a conviction and cited in support of this position **John Mutua Munyoki vs. Republic [2017] KLR** and **Charles Ndirangu Kibue vs. Republic [2016] eKLR.**

47. It was submitted that from the evidence tendered herein, the conduct of the complainant before, during and after the alleged rape is inconsistent with the absence of consent as described above. Indeed, it casts serious doubts as to whether there was any sexual intercourse between the complainant and the Appellant at all. In this regard the appellant relied on the case of **Cornelius Pchumba vs. Republic [2016] eKLR.**

48. To the appellant, the same reasoning is applicable herein. Since the Complainant has not alleged that she was threatened by the Appellant, her failure to tender evidence to show that she took overt steps to resist the actions of the Appellant draw to a possibility that she consented to the alleged sexual acts, if indeed such sexual acts took place. Further reliance was placed on **Muryani Nyanje vs. Republic [2006] eKLR** and L**ekasia Lemalia vs. Republic [2017] eKLR.**

49. According to the appellant, the conduct of the Complainant was inconsistent with the demeanour of rape victims. The testimony of the Appellant that the Complainant was demanding money from him to withdraw the case even after the 13th November 2015 is therefore not misplaced. She took her time to see if the Appellant was going to give her the money.

50. Taking all the evidence presented herein in totality, it was submitted that the inescapable conclusion to be made herein is that no offences were committed against the Complainant and that is why she returned to the same house and stayed there for a week. The alternative would be that if indeed there was any sexual intercourse between the complainant and the appellant, the Complainant, by her own actions, clearly consented to the alleged sexual acts. It was incumbent upon the prosecution to show lack of consent.

51. According to the appellant, in its judgment, the trial court referred to the accused as "Kelvin Githaiga Wang'ombe Syombua**"** An examination of the Charge Sheet reveals that the Appellant is **"**Kelvin Githaiga Wang'ombe.'' The name "Syombua" is thus foreign to the case since there is no witness in this case called "Syombua" to suggest that there was a typographical error. It was the appellant's submissions that the court's mind was clouded with another case and thus imported extraneous matters while writing the judgment. The judgment was thus erroneous. The court also stated that the prosecution called three witnesses. In the typed proceedings and in later parts of

the judgment the prosecution witnesses were five. There is thus another glaring error which clearly reveals that the court yet again was influenced by matters not properly before it and which had no relevance to the case. To the appellant, these irregularities go to the root of the evidence and affect the final verdict of the case. The Appellant was entitled to a fair trial and that means that the only evidence to be considered in the judgment was the one properly tendered before the court. In this case, the Appellant was not subjected to a fair trial and thus the conviction should be set aside as a matter of right.

52. As regards the sentence, it was submitted that considering all the foregoing, all the ingredients of rape were not proved. The court should have only convicted if there was absolutely no doubt as to the guilt of the Appellant particularly in view of the heavy minimum sentence recommended by statute. He relied on the case of **Raphael Mutunga Mutinda vs. Republic [2019] eKLR.** As to the issue whether this case disclose any peculiar circumstances, it was submitted that the Appellant is a young man and a first offender. His testimony is that his parents were separated. He had a frosty relationship with his father as the father thought that he was supporting his mother over him regarding his parents' differences. He had therefore been living with his mother but was chased away for drinking and the fact that he was jobless. This therefore is a jobless young man who is struggling with no love from his parents and no support. He has sought solace from friends who accommodated him and in alcohol which however does more harm to him. The Complainant and the Investigating officer depict him as a drunk;……*"dirty and unkempt.''* Indeed, the I.O. testified thus…*"The mother requested if it was possible he be put under rehabilitation but we did not have evidence of drugs."*

53. It was therefore submitted that the trial magistrate was in error in not investigating this matter further. She had the prime duty to save the young man from himself, not just from society. This is a young man crying out for help. She had the opportunity and indeed a duty to order a medical assessment of the Appellant to verify if he was in need of rehabilitation. Sentencing him to 10 years in jail does more harm to the appellant. Alcoholics are sick people in need of help in the form of rehabilitation. The Court was urged to come to the aid of this lost soul and intervene to save him.

54. However, considering the facts, law and authorities cited hereinabove, the appellant's prayer was that the court allows the appeal, sets aside the conviction and sentence of the trial court, acquits the Appellant on all charges and orders his release from prison.

Respondent's Submissions

55. In opposing the appeal, the Respondent through its learned counsel, **Ms Mogoi**, after setting out the evidence adduced before the trial court submitted that the evidence on the record was sufficient to prove the offence of rape more so the evidence of PW1 that was corroborated by the medical evidence that PW1 was raped.

56. According to the Respondent, it was the evidence of PW1 that the offence took place in broad daylight hence there was no mistake as to the identity of the appellant and even the appellant admitted in his defence having been at the scene on the day and time of the commission of the offence.

57. It was however noted that the trial court in sentencing the appellant to 10 years indicated that it sympathised with the appellant but held that the offence with which the appellant was charged carried a minimum sentence of 10 years and proceeded to sentence him accordingly.

58. In view of the decision in **Muruatetu & Ors vs, Republic Supreme Court Petition Nos. 15 and 16 of 2015**, the Respondent urged the court to consider the circumstances surrounding the commission of the offence, the status of the appellant at the time of the offence and mete out an appropriate sentence. In the circumstances.

Determination

59. I have considered the material placed before the Court. 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."**

60. 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.**

61. 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**.

62. 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).'"**

63. 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."**

64. 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."***

65. 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.''**

66. 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."**

67. In this appeal it has been submitted that from the evidence an issue was raised as to whether the Appellant was, at the time of the commission of the offence, so intoxicated as to be unaware of his actions or the adverse effect of such actions, a possibility the trial court did not explore. In the case of **Kangoro s/o Mrisho vs. R [1956] 23 EACA 532** the predecessor of the Court of Appeal, the Court of Appeal for

East Africa referred to the case of **Cheminingwa vs. R EACA CR No. 450 of 1955** (unreported), in which it was stated:

> **"It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."**

68. Therefore, there are two instances in which a defence of intoxication may arise. First, is where the accused raises a defence of insanity by reason of intoxication. In that case, the burden is upon the accused to demonstrate its probability. Secondly, is where it is contended by reason of intoxication, he was incapable of forming the specific intention required to constitute the offence charged. Although the appellant did not raise any of these scenarios, from the evidence of PW1, the appellant was drunk at the time he confronted the complainant. In **Boniface Muteti Kioko and Willy Nzioka Nyumu vs. R [1982-88] 1 KAR** page 157 it was held:

> **"It was the duty of the Judge to deal with alternate defences, such as intoxication, that emerged from the evidence, which might reduce the charge to manslaughter."**

69. Since the issue of the appellant's state of mind at the time of the commission of the offence arose from the prosecution's own case, the trial court ought to have dealt with the issue.

70. The appellant also raised various inconsistencies in the evidence of PW1, PW2 and the Investigating Officer. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of **David Ojeabuo vs. Federal Republic of Nigeria {2014} LPELR-22555(CA),** where the court (**Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA)** stated as follows:-

> **"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."**

71. 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.**

72. 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."**

73. 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*."**

74. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… 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."**

75. 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."

76. 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."

77. In **Erick Onyango Ondeng' vs. 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."

78. 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."

79. 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."

80. 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).

81. 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. For example, while it is submitted that there was inconsistency as regards how long the complainant had spent in the said house, PW1 stated in examination in chief that she had slept in the home meaning that she did not go to that home on the day of the incident. I also do not find anything unusual about the decision by the complainant to continue staying in the same house since the evidence was that the appellant was not staying therein after the incident. Similarly, nothing substantially turns on the issue of the failure by the complainant to attract the attention of passers-by. From the authorities relied upon by the appellant it is clear that rape and sexual assault for that matter may be a traumatising experience for the victim.

82. As regards the failure to call **Ann Muriuki** as a witness, section 143 of the ***Evidence Act*** provides 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.

83. I can do no more than reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."

84. I am guided by the case of **Mwangi vs. R [1984] KLR 595** where it was stated that:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."**

85. Therefore, the prosecution is not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1EA135** the court was categorical that:-

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

86. In this case the said **Anne Muruiki** only became aware of the incident after the same had happened. Had she been called as a witness, her evidence would have merely been hearsay. I therefore do not see what weight her evidence would have added to the complainant's evidence. The failure to call her cannot in those circumstances call for the invocation of the principle of adverse inference. The same position applies to the failure to call the watchman since there is no evidence that there is anything that he saw or heard that would have assisted the prosecution's case.

87. It was submitted that from the evidence it is possible that the penetration could have taken placed on a day earlier than the alleged day. It is true that one of the ingredients of the offence of rape is penetration and it is important to prove that the penetration in question took place on the alleged day. Therefore, where there is evidence or possibility that the penetration in question might have taken place on a date other than the date in question, it may well raise reasonable doubt as to whether the offence was committed by the accused. This was the position in **Daniel Kiplimo Cherono vs. Republic [2014] eKLR,** where the court held that:

> **"…where a complainant was emphatic that the penetration took the form of complete sexual intercourse like in the present case, the prosecution bears the burden of proving beyond doubt that indeed the victim had engaged in sexual intercourse on the date alleged."**

88. I agree with the holding in **Gerishon Gichera Muremi vs. Republic [2017] eKLR** where the court opined as follows:

> **"I find that medical evidence has failed to prove that penetration occurred on the date indicated on the particulars of the charge. The complainant admitted that she had a boyfriend by name Amos Chomba. There is a possibility based on her testimony that she had multiple boyfriends."**

89. The submission was based on the evidence of PW3, **Ruth Lenget**. According to her, the PRC Form filed by **Cynthia Sitati** on 13th November, 2015 showed that the complainant had contracted STI. In her view, STI takes between 24-72 hours to be detected. It would therefore mean that since the complainant was examined 6 hours after the alleged incident, STI could not have been detected by then. I agree with the submissions that based on the prosecution's evidence, there is a possibility that the penetration that gave rise to the STI could have occurred before the alleged date of the incident.

90. While I agree that it would have been prudent for the condom in question to have been preserved and the fluids therefrom tested to check whether they matched the appellant's, the mere fact however that this was not done does not necessarily amount to the failure by the prosecution to prove its case. The Court of Appeal in **George Kioji vs. Republic, CR App. No. 270 of 2012 (UR)** stated thus:-

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**

91. In this case, however, where the evidence in question points out to the possibility of a penetration earlier than the date in question and since it is admitted that the STI could have been caused by the condom, I agree with the appellant that the failure to subject the fluids in the condom to a test weakened the case against the appellant.

92. It was submitted that since the complainant testified that she did not feel any pain, if there was forcible sexual intercourse, there would be bruises all over the complainant's genitalia particularly on the *labia minora* and that the penis, while penetrating the vagina would cause bruises on the whole entry area particularly if the force goes on for five minutes as alleged. Suffice it to state that section 2 of the ***Sexual Offences Act*** which defines "penetration" provides that:

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

93. Dealing with this section the court in **George Owiti Raya vs. Republic [2013] eKLR** 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."

94. Accordingly, nothing turns on that issue.

95. It was submitted that the learned magistrate throughout her judgment analysed the testimony of the prosecution witnesses in isolation and arrived at a conclusion without considering the evidence of the Appellant. Thereafter, she required the Appellant to rebut her earlier conclusion arising from her analysis of the prosecution case. In **Nguku vs. Republic [1985] eKLR,** it was held by the Court of Appeal that:

> **"Quite obviously when analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so. In this case Mr Menezes' contention regarding the second ground is borne out by the record of the judgment, which shows that the general conclusion was arrived at in advance of the individual analysis of the facts. We do not think that this point was fully appreciated by the learned judges of the High Court on the first appeal for after reciting ground two of the memorandum, which is similar to ground two in the one to this court, they said simply that on their own reading of the file and the judgment they took the view that the allegation was unjust in relation to it. If the course taken in this case is followed the point is almost bound to be taken on an appeal that the directions of this court's predecessor in Okethi Okale v Republic [1965] EA 558 at page 559, which was cited to us by Menezes and which we now set out,**
>
> **'He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v Republic (10), where the trial judge had used similar expressions this court said:-**
>
> **"…. We find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.**
>
> **Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, or course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different)."**
>
> **We think that the observations of this court in that case apply with equal force to the present appeal' have not been complied with.**
>
> **It is true that in that case there had been an acceptance of the prosecution case followed by an indication that the burden was cast on the appellant to rebut it, which is not the complaint here, but we nevertheless think that the direction given in that case should always be observed."**

96. In this case, the learned trial magistrate first set out the prosecution's case followed by the defence case. Thereafter, she proceeded to do what in her view must have been an analysis of the prosecution's case in which she made some findings as regards the proof of the ingredients of the offence. It is after doing so that she considered the defence case. With due respect the consideration of the defence case after making findings as regards the prosecution case was improper. It amounted to analysing the prosecution case separately and in isolation and arriving at conclusions thereof. In so doing the learned trial magistrate fell in error.

97. There are certain troubling findings made by the learned trial magistrate. For example, the learned trial magistrate's judgement indicated that the prosecution called three witness. It is however clear from the record that five witnesses were called for the prosecution. That however is not fatal since the judgement disclosed the evidence adduced by all the prosecution witnesses. Again, the accused in the judgement was indicated as **Kelvin Githaiga Wangómbe Syombua**. Obviously the last name was erroneous. While that may not be fatal to these proceedings, I agree that care ought to be taken to ensure that the description of the parties is properly reproduced and that the record reflects the true proceedings before the court.

98. The appellant also took issue with the comments by the learned trial magistrate that since the appellant did not call any witness to corroborate his sworn testimony, she could not give due consideration to the same. With due respect this was a misdirection on the part of the learned trial magistrate. As was held in **Sekitoliko vs. Uganda (1967) EA 53**:

> **"The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case."**

99. Even where the accused decides not to adduce any evidence, the burden is not lessened by that mere fact. This was the position of the Court of Appeal in the case of **Dorcas Jemutai Sang vs. Republic [2018] eKLR** where was faced with a similar case where the complaint by the Appellant was that the trial court and first appellate court had placed the burden of proof upon her to prove her innocence, the court stated as follows:

"In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:

> ***"…did not call witness to support her defence,"***

and the learned Judge remarked that:

> ***"…it was a significant fact that the appellant did not call …any witness at the trial."***

By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground."

100. The last issue was whether there was corroboration of the complainant's case. In this regard the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** stated that:

"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

101. Similarly, in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal was of the opinion that:

"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:

> **'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'**

The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."

102. It follows that as a matter of practice, corroboration is necessary in sexual offences. However, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning must appear in the judgement of the trial court. In this case the learned trial magistrate did not address its mind to the requirement for corroboration. She therefore did not make any finding as to the truthfulness of the evidence of the complainant. Neither did she warn herself on the danger of basing her conviction upon the uncorroborated evidence of the complainant. In effect, she failed to take into account a statutory requirement.

103. I have on my part considered the evidence before me and I am not satisfied that this was a case in which a conviction ought to have been based on the uncorroborated evidence of the complainant. I have also found that it was not proved beyond reasonable doubt that the sexual intercourse between the appellant and the complainant took place on 13th November, 2015.

104. The trial courts ought to take into account the opinion of the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR** that:

"…where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."

105. In this case 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.

106. What the said section provides for is a *prima facie* mandatory minimum sentence, which has been held by this court and the Court of Appeal as unconstitutional under the current constitutional dispensation. Such sentences do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. Whereas the Court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates. This is my understanding of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** where it expressed itself as hereunder:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**
>
> **[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**
>
> **[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.**
>
> **[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.**
>
> **[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.**
>
> **[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.**
>
> **[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."**

107. Similarly, in **S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6** Kwa Zulu Natal High Court held that:

> **"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:**
>
> **'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'**
>
> **The judgment continues:**
>
> > **'. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'**

108. The Courts have always frowned on mandatory sentences that place a limitation judicial discretion. In **S vs. Toms 1990 (2) SA 802 (A)**

at 806(h)-807(b), the South African Court of Appeal (**Corbett, CJ)** held that:

> **"the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."**

109. In **S vs. Mofokeng 1999(1) SACR 502 (W) at 506 (d)**, **Stegmann, J** opined that:

> **"For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."**

110. Also in **S vs. Jansen 1999 (2) SACR 368 (C) at 373 (g)-(h), Davis, J** held that:

> **"mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused."**

111. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences. My view is in fact supported by the ***Kenya Judiciary Sentencing Policy Guidelines*** where it is appreciated that:

> ***Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.***

112. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

> **"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."**

113. Whereas I appreciate that there is a view held by some jurists that in minimum mandatory sentences the Court has no discretion, in our case clause 7 of the ***Transitional and Consequential Provisions*** provide as follows:

> ***All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.***

114. Therefore, the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the ***Sexual Offences Act, No. 3 of 2006*** must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences to not take into account the dignity of the individuals as mandated under Article 28 of the Constitution as appreciated in the ***Muruatetu Case***.

115. I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

116. However, having found that the appellant was improperly convicted, I allow the appeal, set aside the appellant's conviction, quash the sentence and direct that he be set at liberty unless otherwise lawfully held.

117. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 1st day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey