



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 42 OF 2018**

**ALI MWARO KITSAO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(An Appeal from the Judgement of the Principal Magistrate Hon. Dr. J Oseko given in

Malindi CMC Criminal Case No. 155 of 2016 on 20<sup>th</sup> July 2018)

**Coram: Hon. Justice R. Nyakundi**

**Mr. Chamwada Advocate for the Appellant.**

**Ms. Sombo, Counsel for the Director of Public Prosecutions**

**JUDGEMENT**

1. Mwaro Ali Kitsao the appellant herein was charged with the offence of Rape contrary to **Section 3[1][a], [c] and [3] of the Sexual Offences Act No. 3 of 2006**. Alternatively, he faced the charge of committing an indecent act contrary to **Section 11[A]** of the Act. The particulars of the offence were that on 11<sup>th</sup> October 2015 in Malindi Sub County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of one PTM a girl aged 24 years by using threats. In the alternative charge, he appellant intentionally and unlawfully committed an indecent act by touched her vagina with his penis.

2. The prosecution called six [6] witnesses to prove their case. At the close of the prosecution's case, the appellant was found to have a case to answer and put on his defence. He gave sworn testimony and called two [2] other witnesses to his aid.

3. At the close of the case, the learned trial magistrate found that the prosecution had proven its case beyond reasonable doubt and found the appellant guilty. The appellant was afterwards sentenced to 20 years imprisonment.

4. Being aggrieved with this finding, the accused has proffered the instant appeal based on the following grounds:

**a. The Learned Magistrate erred in convicting the Appellant on the charge of Rape contrary to section 3(1) (a) (c)(3) of the Sexual Offences Act No. 3 of 2006.**

**b. The learned Magistrate erred in Law and Fact in convicting the Appellant on evidence that did not meet the standards required in Law to uphold a conviction for the offence.**

**c. The learned Magistrate erred in Law and Fact by meting upon the Appellant an excessive sentence in the circumstances.**

**d. The Learned Magistrate erred in not properly considering the evidence and the Defendant's defence and submission hence arriving at an erroneous decision**

**e. The learned Magistrate erred in law in convicting the appellant of the offence of rape notwithstanding that the evidence before the trial court, when properly analysed and evaluated, did not support the conviction**

## The Evidence at Trial

5. PW1 CP Charles Getende conducted the identification parade with the consent of the accused person. His testimony was that the complainant identified the accused person at the parade. That he protested that the witness had been shown photographs which he denied. He produced the identification parade form in court as exhibit 1.
6. PW2 PTM was the complainant and she told the court that on the 10<sup>th</sup> October 2015 at around 2.00 pm she was walking towards Kichinjioni in Malindi from her place of work where she sells juice in a shop. She met a man who was riding a motor bike who introduced himself as Charo and whom she identified in court as the accused person. That the accused offered to get her employment at the Scorpio Villa as a room steward at a salary of KSh. 9,000/- per month. They exchanged numbers and accused promised to get in touch. It was her testimony that the following day on 11<sup>th</sup> October 2015, the accused called her. They met at 2:00pm. The appellant had a motorcycle which she boarded and he rode towards the General Hospital direction. He explained to her that he would take a short cut. They drove into some bushes. The accused stopped the motor bike inside the bushes. He told her to alight and then turned on her hitting her with his fists and then he held her neck and squeezed her throat.
7. PW2 further testified that the accused told her that he knew her dad and had also married her sister who had poisoned his child but he did not mention their names. The accused told her that he must revenge. He continued beating her face with cloth he had, pushed her onto the ground and raped her against her will. She started screaming but no one came to help. After some time, someone appeared and the accused rode off leaving her in the bushes. The man who appeared also had a motor bike he found her and took her to the hospital where she was examined and treated. She later reported to the police. She was issued with a P3 form (exhibit 4). It was filled after she was examined. She also identified her treatment notes and lab test results as exhibits 2 and 3 respectively.
8. It was further testified that the complainant was called to the police station and asked if she could identify her assailant. She answered in the affirmative. She stated that the accused had at one time wore a helmet out that he had also seen him without the helmet and said she could identify him. It her testimony that on the day they first met on 10<sup>th</sup> October 2015, the accused did not have his helmet on but on the following day when they met he had a helmet on but he lowered the glass shield and she recognized him as the person she had met the previous day. She insisted that she could recognize him very well and did not confuse him with another person.
9. In cross examination PW1 stated that she did not know the women the counsel mentioned to her. She also stated that she was not a virgin on the date the alleged offence occurred and that on that day she was having her monthly periods. She admitted that there had been no injuries on her private parts after the rape. She further testified to having identified the accused at an identification parade but denied being shown his picture in advance by the parade officer PW1 before the parade was conducted. She denied coming to court in order to extort money from the appellant and further denied having ever sent PC Okumu to get money from the appellants relatives so that she could drop the charges.
10. PW3 JKT was the complainant's father. His testimony was that he received the news of the complainant's rape and she told him how accused raped her. He took her to the hospital.
11. PW4 Mariam Charo was at the scene. She said she saw a man leaving the bushes and found the complainant crying. She took her to the road where she put her on a motor bike to be taken to hospital. That the man was wearing a helmet and she did not see his face well.
12. On cross examination, she testified that when she found the complainant, she was crying and her hair had leaves. She confirmed that she did not take the complainant home and denied that the charges against the accused were trumped up.
13. PW5 PC Robert Kinuthia was the police officer who received the complainant at the police station on the material date. He observed the complainant was injured. She had bruises on the face while was also swollen. She also had injuries on her neck and head. She advised her to go for treatment. She issued her later with a P3 form which was returned duly filled after examination. It was his testimony that on 29<sup>th</sup> February 2016 the accused was arrested in another case. He placed the accused into custody. The complainant was called and an identification parade was conducted and the accused was identified by the complainant. He produced the birth certificate of the complainant [Exhibit 5] which showed that she was 24 years old.
14. In cross-examination he stated that the accused had many cases and the identification parade was done on the same day. He denied showing the witnesses any picture of the accused. He also denied delaying the case to come to court when it was suggested they were attempting to extort money from the accused person. He produced his statement as exhibit Defence Exhibit 1A. He said there was no description of accused person in the statement and explained that he recorded his statement after the complainant was located and that is why the investigation diary does not contain the date the offence was committed.
15. PW6 Dr. Ibrahim was the clinical officer who examined the complainant on 14<sup>th</sup> October 2015 after the alleged incident. His observations were that the complainant exhibited swollen and tender to touch eyes, swelling and tenderness of right throat, tenderness and swelling of the right thumb, broken hymen and blood in vaginal area as she was on her monthly period. He further testified that the lab test results revealed the presence of spermatozoa and epidural cells. There were also sperms in the urine. He reached the conclusion that a rape had probably occurred. He filled the P3 and produced it in court as exhibit.
16. The Appellant was placed on his defence at the close of the prosecution case. He denied the charge of committing the crime alleged by the prosecution witnesses. He further told the court that he was 19 years old. That on the material date he was working in the home of PW3 Hon. Michael Kingi as a watchman. That on the material date he was on duty from 7:00 am to 6:00 pm. That on 29<sup>th</sup> February 2016 while walking with his colleague James. He was sent with his motorcycle to buy fuel. When he reached the petrol station he was surrounded by members of the public and was arrested on the allegation that he was a thief. He was taken to the police station and to court the day after. That the police sought for an extension of time to continue with investigations. It was his testimony that on 2<sup>nd</sup> March 2016 an identification parade was conducted. That the police showed his photos to the complainants prior to the parade. That in the process he alleged that one

police officer CPL Okumu asked for a bribe so as to finish the case. He produced a complaint written by his advocate against CPL Okumu (defence exhibit 1) amongst other complaints. He also produced the investigation diary as defence exhibit 2 and the Occurrence Book extract as defence exhibit 4.

17. DW2 Lucy Francis Fondo told the court that together with her husband, DW3, they lived in casuarina area of Malindi with the accused and 2 other servants. That the accused was employed as a guard in the home and commenced his job in the New Year 2015. She produced a register to show that the accused was at work on the material date till 6:00pm [defence exhibit 5]. She also produced a payment voucher for the accused person's receipt of salary to prove that he was in employment.

18. DW3 Michael Kingi the Member of Parliament Magarini testified in favour of the accused. His testimony was that on the material date he was at home with accused and DW2 but he left to take DW2 to hospital and was back home at 6:30 pm. He further averred that he did not see the accused leave the compound. He further confirmed that DW2 kept a register of workers and paid accused using cash voucher [defence exhibit 2]. He further stated that CPL Okumu approached him with the information that some of the complainants had approved a proposal that if they are paid they will drop the cases. CPL Okumu wanted a facilitation fees of kshs.10,000/-. He gave the court the telephone number that CPL Okumu had used call him and also accused in text messages. He declined this request. He confirmed instructing his advocate to write a complaint letter to the DPP over this bribery allegation.

### **Submissions on Appeal**

19. Mr. Chamwada conducted the Appeal on behalf of the appellant. In his written submissions, placing reliance on **Wilson Morara Siringi v Republic [2014] eKLR** it was submitted that in order to prove the offence of rape, under section (3) of the Sexual Offences Act, 2006 the prosecution must prove the following: The accused intentionally and unlawfully commits an act which causes penetration into his or her genital organs; The other person does not consent to penetration; or consent is obtained by force or by means of threats or intimidation of any kind. It was submitted that all the 3 ingredients for rape were not proved in this case. The case was made that the evidence on record was contradictory, the evidence in the P3 form contradicted the oral testimony of the witnesses. It was submitted that lack of consent was not proven and further that in any case, as per the contradictory statements of PW1, the consent had not been obtained through fraud or coercion.

20. It was further submitted that the prosecution failed to call crucial witnesses and in particular the motorbike rider that allegedly took the complainant to hospital on the material date. For this limb of argument, reliance was placed on **Bukenya vs Uganda [1972] EA 449** and **Peter Sambaga Kitinga vs Republic [2014] eKLR**. The Appellant's contention was that the prosecution's case on whether rape was committed was doubtful as there were numerous contradictions and gaps that had not been explained and that these alleged contradictions affected the substance of the prosecution case. The court was urged to follow the Ugandan decision in the case of **Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, and 2003) UGCA**

21. Counsel went on to submit that the identification of the accused was doubtful. It was contended that the identification parade was a sham as the complainant had been shown photos of the accused prior to the parade by PW5 and that the only time the appellant was identified by the complainant and PW4 was during dock identification hence such identification was worthless. This point was buttressed by **Gabriel Kamau Njoroge vs Republic [1982-1988] KAR 1134** and **Wamunga v. Republic (1989) KLR 424**.

22. It was submitted that the Learned Magistrate erred in not properly considering the evidence and the Defendant's alibi defence hence arriving at an erroneous decision. Reliance was placed on **Victor Mwendwa Mulinge vs Republic [2014] KLR** and the case of **Kiarie vs Republic (1984) KLR**.

23. Finally, it was submitted that the trial magistrate erred in holding without any basis that the accused did not raise this defence of alibi at the time of pleading to the charge for there was no legal basis for him to do so and in any event the prosecution had a chance to rebut by adducing evidence in reply; she erred by failing to consider the inconsistencies in the prosecution evidence especially on the issue of time, place and want of description of the accused on the fateful day to warrant the court to disregard the alibi; the trial court without any basis disregarded the payment voucher and attendance register on the basis that they were copies despite there being no objection from the prosecution; It was onerous on the part of the trial court to demand that the accused was to be constantly watched from morning to evening as he went on his daily working activities and lastly that the trial court erred by holding that motorcycle was the common denominator yet its Registration number, make or owner remains a mystery.

24. Ms. Sombo vehemently opposed the appeal through her written submissions on behalf of the Office of the Director of Public Prosecutions. She addressed the court on each of the grounds of appeal cited by the appellant separately. Regarding the issue of whether the learned trial magistrate erred in convicting the appellant on the charge of rape, reliance was placed on **Section 3(1) of the Sexual Offences Act** for the definition of rape and **Section 42** for the definition of consent and **Section 43(1)** for what constituted intentional and unlawful acts. It was submitted that the complainant's testimony showed that the offence of rape had occurred.

25. The next issue was whether the learned trial magistrate erred in law in convicting the appellant on evidence that did not meet the standards required in law to uphold a conviction for the offence. It was submitted that the trial court had correctly held that the complainant described the act in detail sufficiently to appreciate the act. Further the lab test results revealed that spermatozoa were seen and also epithelial cells. These are indicative that there was penetration and deposit of sperms in her vagina. It was submitted that the complainant clearly testified that she did not consent to the act. On the issue of penetration, reliance was placed on **Pius Nyababwi Nchagwa v Republic [2016] eKLR** and **Mark Oiruri Mose vs R (2013) KLR**.

26. Turning to whether the learned Magistrate erred in law and fact by meting upon the appellant an excessive sentence in the circumstances, prosecution counsel submitted that Section 3 (3) of the Sexual Offences Act provides that a person guilty of an offence under that section is liable on conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. Citing **Charles Ndirangu Kibue v Republic [2016] eKLR** it was submitted that in the instant case the Appellant was sentenced to twenty (20) years imprisonment which was commensurate to the nature of the offence.

27. As for whether the learned Magistrate properly considered the Appellant's defense and submissions, Ms. Sombo argued that from the record of proceedings at the lower court, that court in its judgement at page 84 lines 11 to 13 noted in making its analysis of the evidence as follows: ***'I have considered the evidence adduced by the and the defense. I have also considered the issues raised in cross examination by both sides, the issues raised in submissions and authorities cited'***. It was submitted that the court considered and dismissed the defense of alibi raised by the Appellant as an afterthought after weighing the evidence of PW1 and PW4 against that of the accused person and his two witnesses as the former was more cogent and believable and the defense failed the test of casting doubts on its veracity as seen on page 92 of the record. Reliance was placed **Haro Guffil Jilo vs. R on Criminal Appeal No. 240 of 2011 (2014) eKLR**.

28. Finally, regarding whether the evidence on record was sufficient to support a conviction, it was submitted that it was and that the prosecution led evidence to prove all the essential elements of the crime of rape against the Appellant herein. Further, it was submitted that as per Section 143 of the Evidence Act, 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. Counsel cited **Criminal Appeal No 177 of 2008; Peter Mote Obero & Another V Republic [2011] eKLR**.

### **Analysis and Determinations**

29. I have considered the charges, the evidence, submissions by the appellant's advocate and the submissions by the prosecution counsel for the state. Pursuant to the principles established in the cases of **Njoroge v R 1987 KLR** and **Okeno v R 1972 EA 32**, this being a first appeal I am under a duty to re-evaluate the evidence and be able to draw my own conclusion bearing in mind that I have no advantage of the trial court in making references to the velocity and demeanour of witnesses. I have considered the entire record and the grounds advanced by the appellant challenging his conviction and sentence. In my view, this appeal turns on the singular issue of whether the prosecution proved its case beyond reasonable doubt to sustain a conviction of rape.

30. My point of departure is restating the law on the offence of rape. Rape is defined under Section 3 of the Sexual offences act No. 3 of 2006 as comprising the following elements:

***a. The intentional and unlawful penetration of the genital organ of a male person to a female genital organ.***

***b. The absence of consent or where consent is obtained by force, threat, intimidation, fraud or false pretence of any kind.***

***c. That the accused person was positively identified and placed at the scene***

31. From the foregoing, in order for the conviction on a charge of rape to be sustained, the prosecution had not only to place the appellant at the scene of the crime but also show that the complainant had positively identified the accused person. In addition, it was for the prosecution to show that the accused had intentionally and unlawfully caused penetration of the genital organ of the complainant without her consent.

32. Let me begin with the identification of the accused. The principles to be followed were stated in **Cleophas Otieno Wamunga vs Republic (1989) KLR 424**, as follows: -

***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification"***.

33. It is trite that there is need for careful scrutiny of identification evidence, before basing a conviction on it. This principle was espoused in the dicta from the case of **Abdullah Bin Wendo vs Rex 20 EACA 166** in the following manner:

***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

34. In view of the foregoing principles on identification, the evidence of PW1 points at the Appellant as the perpetrator of the heinous act. She identified the appellant in an identification parade that was conducted in accordance with the law. According to the identification parade form (Exhibit I) all the requirements outlined in the case of **R v Mwangi son of Manaa (1963) SEACA 29** regarding the conduct of such parades were complied with. PW1, the officer who conducted the parade was cross examined and the integrity of the exercise was not doubted. The allegations that PC Kinuthia showed the complainant photos of the accused before the parade were not satisfactorily explained. Further, it was the complainant's testimony that she met the accused on two occasions. On the first day, he had offered her a job at Scorpio Villa and on the second day, which was the material date, he had offered to take her to Scorpio Villa. PW2 was adamant that she knew the accused and as result this case is one of recognition rather than identification.

35. On this point my view is one shared by the court in **Anjononi & Others vs Republic, (1976-1980) KLR 1566**, where it was held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.

36. A similar point was entrenched in the case of **R vs Turnbull & Others (1973) 3 ALL ER 549**, where the Learned Judge in that instance stated that:

***“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

37. In the criminal appeal case of **Titus Wambua vs Republic Criminal Appeal 23 of 2014**, the court observed that we must examine the conditions that existed at the time and scene of the crime and their favourableness or otherwise positive identification or recognition as alleged by the complainant as well as the state of mind of the complainant which would determine whether he or she had capacity to identify the appellant.

38. Having stated the foregoing, I now turn to the facts of the case. I have already determined that in this instance it was a case of recognition rather than identification. This is so because the complainant testified to having met the appellant on two different occasions. On the first occasion he was not wearing a helmet. On the second occasion which was the material date, the appellant was wearing a helmet which he lifted the glass part of to reveal his face hence the complainant was able to recognise him again. On the material date, the appellant met the accused person in broad daylight, they had spoken at length and even exchanged number the previous day. The complainant boarded the appellant’s motorcycle and was with his for a considerable amount of time. All these factors point to the circumstances for a positive identification being favourable.

39. Further corroborating the evidence of the complainant placing the appellant at the scene is the testimony of PW4 which places a man wearing a helmet speeding off on a motorcycle from the scene of the alleged offence.

40. Concerning the alibi defence raised by the appellant and the contention that the learned trial magistrate failed to take this into account in reaching her decision, my position is that in circumstances where an alibi defence is raised at a later stage in the trial, such as in the instant case, the correct approach is to consider the defence against the evidence adduced by the prosecution. That is the position taken in **Ganzi & 2 Others vs Republic [2005] 1 KLR 52**, where the Court stated that where the defence of alibi is raised for the first time in the appellant’s defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.

41. In the alibi defence raised by the appellant, he contended that he was not at the scene at the time of offence but he was at his place of work all day and never left the compound on the material day. The appellant called two other witnesses to buttress his assertion that he never left the compound on the material day until 6.00pm after his work day had ended. DW2, his employer’s wife, testified that on the material date she was at home and so was the appellant. She produced registers and a payment voucher to prove that the appellant was their employee. DW3 was the appellant’s employer. His testimony was that on the material date he was at home and saw the appellant. That he however left to take his wife, DW2, to the hospital and they returned at 6.00pm and found the appellant in the home.

42. My analysis of the defence witnesses’ evidence leads me to the conclusion that neither of the two parties called by the appellant could confidently state that the accused did not leave the compound between 2.00pm and 3.00pm when the incident occurred. While both witnesses testified to seeing the appellant at some point in the home, DW3 testified to having left and gone to the hospital and taken DW2 with him at some unspecified time but when they returned in the evening at 6.00pm, the appellant was at home.

43. Weighing the alibi against the evidence adduced by the prosecution, I am inclined to take believe the prosecution’s version of events. The complainant has described in detail how she met with the accused twice. The complainant’s testimony together with the testimony of PW4 placed the appellant at the scene of the crime. Furthermore, PW2 was adamant in her assertion that it was the accused who raped her at the bushes at Muyeye area and she identified him in a procedurally conducted identification parade.

44. In the premises, I am convinced that the evidence on record is enough to ascertain that the Appellant was positively identified as the perpetrator of the alleged rape. It is therefore my finding that the learned trial magistrate, on analysis of the evidence on record, was correct in reaching the conclusion that the appellant had been positively identified.

45. Having conclusively placed the appellant on the scene of the crime, all that was left was for the prosecution to adduce evidence in support of the contention that the appellant, without the consent of the complainant, intentionally and unlawfully caused his penis to penetrate her genital organs.

46. **Section 2 of the Sexual Offences Act** defines penetration to mean the ***‘partial or complete insertion of the genital organ of a person into a genital organ of another person.’*** Under **Section 43** of the Act, intentional and unlawful acts include: any coercive act, an act committed under false pretence or fraudulent means, intimidation, use of force, threat, harm and absence of power of any kind so as to have carnal knowledge with the complainant.

47. **Section 42 and 43 of the Sexual Offences Act 2006** provides as follows;

**42. Consent**

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

**43. Intentional and unlawful acts**

***(1) An act is intentional and unlawful if it is committed—***

***(a) in any coercive circumstance;***

*(b) under false pretences or by fraudulent means; or*

*(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.*

*(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—*

*(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;*

*(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or*

*(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.*

*(3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person—*

*(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;*

*(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or*

*(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life threatening sexually transmittable disease.*

*(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act—*

*(a) asleep;*

*(b) unconscious;*

*(c) in an altered state of consciousness;*

*(d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;*

*(e) mentally impaired; or*

*(f) a child.*

*(5) This section shall not apply in respect of persons who are lawfully married to each other*

48. Applying the above legal provisions to the present case I find that from the record the appellant PW2 testified that the accused told her that he knew her dad and had also married her sister who had poisoned his child but he did not mention their names. The accused told her that he must revenge. He attempted to strangle her and beating her face with cloth he had, pushed her onto the ground and raped her against her will. The medical evidence of PW6 shows that the lab test results revealed the presence of spermatozoa and epidural cells. There were also sperms in the urine. Regarding the element of consent, the complainant was adamant in her testimony that she did not consent to the act.

49. It is therefore my finding that in the instant case, the state has proven that penetration took place between the complainant and the appellant as is defined in law. In addition, the complainant clearly did not consent to the appellant's advances and he used violence on her in order to commit the offence of rape. The learned trial magistrate did not err in reaching her finding. On this limb, the appellant's argument falls short.

50. Finally, as regards the alleged inconsistencies and/contradictions in the prosecution case, it is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. See *Uganda vs Rutaro* {1976} HCB and *Uganda vs George W. Yiga* {1979} HCB 217). On this issue the court in *Philip Nzaka Watu v Republic* (2016) CR APP 29 OF 2015, had this to say:

*“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 recognized 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.”*

51. The Court of Appeal decision in **Erick Onyango Odeng’ vs Republic [2014] eKLR** also comes to mind. In this matter, the court cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** in which it was held as follows:

*“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 case.”*

52. I find no irregularities in the evidence. The prosecution did not have to call each and every witness. **Section 143 of the Evidence Act** provides that no particular number of witnesses shall in the absence of any provisions of law to the contrary be required for the proof of any fact. The evidence of PW2 and PW4 was sufficient to place the appellant at the scene.

53. Further, **Section 124 of the Evidence Act** (the proviso thereto) clearly stipulates that the Court can convict the accused person in a prosecution involving a Sexual Offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief: (See **George Kioyi V R Cr. Appl 270/2012 (Nyeri)** and **Jacob Odhiambo Omumbo V R. Cr. Appl 80/2008 (KSM)**).

54. Having weighed the appellant’s case on appeal against the evidence on the record, I am satisfied that the appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal on both conviction and sentence. In the result, I affirm the judgement of the court below and dismiss the appeal in its entirety.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2019.**

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**R NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Sombo for the state
2. Ms. Mwendwa for Chamwada for the appellant