



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIIAYA**

**CRIMINAL APPEAL NO 36 OF 2017**

**(CORAM: HON. R.E. ABURILI)**

**SAMUEL OGOLA OPONDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(appeal arising from the judgment, conviction and sentence passed by*

*Ukwala SRM Hon. G. Adhiambo in Ukwala SRM Cr Case No 35 of 2017 on 20<sup>th</sup> March 2017)*

**JUDGMENT**

1. This is an Appeal against conviction and sentence of 15 years in respect of Ukwala Senior Resident Magistrate's Court in Criminal case Number 35 of 2017, R. vs. **SAMUEL OGOLA OPONDO** delivered on 20/03/2017.

2. The Appellant - **SAMUEL OGOLA OPONDO** was charged with the offence of Rape contrary to Section 3 (1) (a) (c) (3) of the Sexual Offences Act No. 3 of 2006 and an Alternative Charge of Committing an Indecent Act contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

3. The facts as per the charge sheet respectively are that, **SAMUEL OGOLA OPONDO**: on 30<sup>th</sup> day of January, 2017 at [Particulars withheld] area in Ugunja Sub-county within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of **LH (name withheld for privacy)**;

AND

4. **SAMUEL OGOLA OPONDO**: on 30<sup>th</sup> day of January, 2017 at [Particulars withheld] area in Ugunja Sub-county within Siaya County, intentionally touched the vagina of **LH** against her will.

5. After a full trial, the Appellant -**SAMUEL OGOLA OPONDO** was found guilty of the main charge and convicted with the offence of Rape pursuant to Section 215 of the Criminal Procedure Code and sentenced to serve fifteen (15) years imprisonment.

6. Aggrieved and dissatisfied with the said conviction and sentence, the appellant filed a Petition of Appeal raising the following grounds:

***1. That, the Learned trial magistrate erred in fact and in law by not observing that the medical examination herein fell short of the required standard of proof.***

***2. That, the learned trial magistrate erred in fact and in law by failing to consider that there existed a filial grudge that resulted into the allegations.***

***3. That, the learned trial magistrate erred in law and fact by failing to consider that the prosecution failed to call key witnesses to testify before court.***

***4. That, the learned trial magistrate erred in law and facts by ignoring to consider the alibi defence statement which was strong enough to earn me an acquittal.***

***5. The right of habeaus corpus.***

**6. Finally he does pray that the appeal be allowed, conviction quashed and sentence be set aside or be allowed to go through a retrial of this case for justice to prevail.**

7. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Pandya vs. R (1957) EA 336** and **Ruwala vs. R (1957) EA 570**, which is to subject “*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own inferences and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses as they testified.

8. On what transpired during the pendency of the case in lower court.

#### **LOWER COURT PROCEEDINGS.**

9. **PW1** - the Complainant- LH (**name withheld for privacy reasons**) testified that she was working at the home of the accused/appellant together with her husband HK (name withheld for privacy reasons) where they were working as caretakers of the accused. She stated that on 30/1/2017 at around 10.00 am she was doing laundry at her place of work which is also the home of the accused and the accused was also in the aforesaid homestead. That the accused approached her from behind her, held her hand then pulled her backwards and occasioned her to fall. She said that the accused then pulled her on the ground and slapped her severally on the back as well as on the cheek while he strangled her with his hands. That he pulled her into his house (a single room) which was still within the same compound.

10. That the accused locked the door of the house and forcefully undressed her by tearing of her skirt and forcefully had sex with her. It was her testimony that after the accused pulled off her skirt, he pulled off her inner pant and raped her on the mattress that was on the floor.

11. She stated that after that, the accused left her and locked her inside the said house although he locked the door with a shutter. The complainant stated that she screamed loudly while peeping through the window of the house and saw that the accused was seated outside, that at that point she opted to cheat the accused that a dog was carrying sugar from the kitchen and its then that the accused opened and she got an opportunity to escape.

12. She further stated that she escaped with her skirt without her inner pant and found her husband on the road and told him what had happened because at the time that the accused was raping her, her husband was not in the compound. That her husband and herself went to the Chief of Sidindi and reported the matter then the Chief directed them first to go to the hospital although she could not remember the name of the hospital they went to. That she was treated and given medication. They then went to the Chief, who referred them to Ugunja Police Station where she reported the matter and was issued with a P3 form which was filled at the hospital.

13. She identified her treatment book issued to her at Ambira Sub county Hospital and dated 30/1/2017 and a P3 Form dated 31/1/2017 as PMF1 1a and 1b respectively. She identified the person who raped her as the accused person therein and stated that as at the time the accused was raping her, she had worked at the home of the accused for 15 days and she was yet to be paid her first salary. She added that she did not know the accused before and that she did not even consent to the act and that the accused had never seduced her.

14. It was her further testimony that when the accused was raping her, the accused told her that he used to be a GSU officer and that he could even kill her. She said that the incident occurred during the day, that there was light and that even as the accused was raping her, the window was open and some light was getting into the accused's house. She said that at the material time, only her and the accused were in that home.

15. On **cross examination** PW1 reiterated her earlier testimony and stated that she was aged 18 years old. She stated that the accused did not show any signs that the accused was interested in her only that there was a time the accused arrived home while drunk and slept on the bed of her husband and herself occasioning her and her husband to seek the intervention of the accused's brother. She stated that the accused washed his clothes before raping her. She further stated that at first the accused forcefully held her and she forcefully pulled off the accused's hand. She denied framing up the accused. She stated that the accused took his brother's chicken and the brother of the accused said that he would report the matter.

16. On **re-examination**, she insisted that she had no reason to frame up the accused and that she had not framed up the accused.

17. **PW2, KOO (full name withheld for privacy)** who identified himself as the husband of PW1 testified that he was an employee of the accused working as the caretaker and stated that on 30/1/2017 as he was still in employment of the accused at the latter's home in [Particulars withheld], the accused sent him to Sidindi market at around 10.00 am to collect the phone of the accused which he said he had taken to the market for charging. That PW2 left his wife PW1 doing laundry at their place of work that is the home of the accused outside the accused person's house.

18. PW2 stated that while he was on his way back from Sidindi market he met his wife crying on the road and on enquiring as to what had happened to his wife, his wife told him that the accused (that is their employer) had beaten her and raped her. He stated that his wife told him that the accused strangled her and dragged her against the ground after attacking her from behind. He also stated that his wife told him that the accused beat her up, pulled her to the house where he forcefully undressed her, lay on top of her and then raped her by forcefully having sex with her.

19. PW2 further stated that he feared going back to the accused's home because he (PW2) was new in that area and he instead went to Robert the cousin of the accused and told him what the accused had done stated that he asked Robbert to take him to a place where he could find a hospital since he was new in that area and he had no idea as to where he could find a hospital.

20. That he then took his wife to the Simenya Hospital but they were referred to Ambira Hospital and as he did not have any money, he decided to first report the matter to the Chief of Simenya who gave them Kshs. 500/= to take his wife to hospital that is the Ambira Sub

County Hospital where his wife was treated and then they reported the matter at the Ugunja Police Station where he said they were given a letter which they took to the Chief. He stated that the Chief upon receiving the letter called the AP officers from Simenya Administration Police Post who then went to the home of the accused Samuel Opondo where he identified the accused to the police but the accused managed to escape.

21. Further that the police raised an alarm and with the help of the members of public they pursued the accused and managed to arrest him. He also testified that by then he had worked for the accused for 15 days. He further stated that the accused did not have any prior relationship with his (PW2's) wife. It was his testimony that at first they lived with the accused's wife for 4 days and then the accused called his wife to Kisumu. That the wife of the accused travelled to Kisumu and left him (PW2) with his wife (PW1). Further that the accused travelled back to his rural home (where PW1 and PW2 were working) on Sunday morning and on Monday, the accused raped his wife adding that it was the first time for the accused to travel to his rural home while he and his wife were living in that compound and that he had never quarreled with the accused.

22. On **cross examination**, PW2 stated that the accused just started his bad habit when he arrived at his home while drunk and slept on their (PW1 and PW2's) bed. He stated that as he was planting vegetables the accused kept pestering him to take the phone for charging and he complied and denied framing up the accused.

23. He stated further that the accused even plucked the braids from his wife's head and hit his wife's forehead and he recalled that his wife had a black skirt and that his wife even lifted up her skirt and he saw sperms as well as semen flowing down her thighs.

24. **PW3- Christopher Otieno Muliro**, the Chief of South Ugenya location testified that on 30/1/2017 at around 1.00 pm, when one Kevin alias Pambo brought in PW1 and PW2. He stated that PW1 identified PW2 as his wife and reported that his boss had just raped his (PW2's) wife.

25. It was his testimony that he referred PW1 and PW2 to Simenya Health Centre but after 30 minutes they went back to him and told him that they could not get a clinical officer and further that they had been advised to go to hospital the following day. He said that PW1 and PW2 told him that they did not have money to proceed to the Ambira Sub-county Hospital and so he gave them Kshs. 500 to facilitate them going to the said Ambira Sub County hospital and further directed them to report the matter at the Ugenya Police Station after PW2 gets treatment.

26. He stated that later at 6.00 pm PW1 and PW2 went back to his office after PW2 was treated and that they had already reported the matter at the Ugunja Police station. He further stated that PW2 also had a P3 Form which was to be filled the following day. That they told him that their boss was the offender and was intending to travel back to Kisumu thus he called Administration Police Officers from Simenya base and they proceeded to the home of the accused and on the accused seeing them from a distance, he started running towards the stream.

27. That PW3 raised an alarm and members of the public assisted them by pursuing the accused into the sugarcane plantation where the accused had escaped to. that they managed to get him and he was arrested and escorted to Sidindi Chief's office upon which the OCS Ugunja Police Station and a police vehicle came and collected the accused. The Chief also stated that he knew the accused for a period of three to four years.

28. On **cross examination** he stated that that was the first complaint that he had received about the accused.

29. **PW4- No. 1047322, Neliah Muthoni**, a Police Constable attached to the Ugunja Police Station told the court that on 30/1/2017 she was at the Ugunja Police station where at around 5.00 pm the complainant herein lodged a complaint of rape against the accused person herein. She stated that the case was minuted to her to investigate.

30. She further stated that later at around 8.00 pm the complainant, her husband and an AP officer from Simenya AP Camp availed themselves at the police station to record their statements but she said that she told them to avail themselves the following day that is on 31/1/2017 for purposes of recording their statements because she was unable to record the statement at night.

31. It was PW4's testimony that on 31/1/2017, the said witnesses availed themselves very early in the morning and recorded their statements. She stated that by then the complainant had already been treated on 30/1/2017 but the P3 Form of the complainant was filled on 31/1/2017. She also stated that the accused Samuel Opondo Ogolla had been arrested on 30/1/2017 because the area chief said that he was likely to escape.

32. PW4 further stated that in the course of her investigations, she found out that the complainant was at the home of the accused who was their employer and that on 30/1/2017 at 10.00 am the complainant was doing laundry when the accused approached her from behind, grabbed her by her hair and dragged her into the house, locked the house from inside and raped the complainant. She stated that the complainant told her that the accused thereafter left the house and locked her inside the house and that the complainant stated that she kept peeping through the window and noted that the accused was seated outside the house.

33. She further testified that the complainant reported that at the time she shouted that a dog was carrying the sugar from the kitchen which was opposite the window, then the accused opened the door and the complainant got an opportunity to escape.

34. That the complainant reported that she ran while screaming, then she met her husband and informed him of what had happened. She stated further that the complainant said that on her way, people were stopping her but she did not stop because she was a *Luhya* by tribe and she could not understand the *Luo* language that was commonly used in that area. PW4 added that the report she received was that the complainant and her husband reported the matter to the area chief Mr. Muliro who then referred them to Ugunja Police Station and advised the complainant to go to the hospital. She further stated that the area chief was the one who funded the complainant and her husband to travel from Sidindi to Ugunja and that even the phone the husband of the complainant had gone to collect for the accused was left at the

Chief's office.

35. She also testified that, the doctor's report showed that indeed there was forceful penetration. She then identified the accused person therein as the suspect she charged, and identified the P3 form of the accused as PMF1 1b.

36. On **cross examination**, PW4 stated that she also looked at the P3 form prepared by the doctor and that she also visited the scene after the accused was arrested. It was her testimony that the window where the complainant was peeping was opposite the kitchen. She insisted that when the accused saw the people who were going to arrest him, he escaped but the people managed to arrest the accused. She stated further that the doctor confirmed that there was forceful penetration.

37. **PW5- Howard Okeyo**, a Clinical Officer based at the Ambira sub county Hospital told the court that he had appeared before court to produce the statement notes and the P3 form of L.H.(PW1). He stated that the patient went to Ambira sub county hospital on 30/1/2017 for treatment following sexual assault by a male person well known to her and that her skirt was torn. He testified that by the time he examined the complainant, she had already changed her inner pant. He confirmed that when he physically examined the patient, he noted that the right neck wall was tender, slightly swollen and it had lacerations. The left side of her neck wall had mild tender oedema and the right knee had a tender linear mild oedematus lacerations. He stated that the injuries were occasioned by both blunt edged and sharp edged objects. That on examination of the genitalia of the complainant, the vaginal walls were tender, the labias were tender, and there was a whitish locoid per vaginal discharge on the endroitus of the vagina. He also stated that the tests done did not reveal any venereal disease. He concluded that the clinical findings were indicative of an earlier (within 12 hours) possible forceful vaginal penetration with bodily harm. He then produced the patient's health book of L. H.issued at the Ambira sub county hospital dated 30/1/2017 with a review date of 31/1/2017 and P3 form of L. H. dated 31/1/2017 as exhibit 1a and 1b respectively.

38. On **cross examination** PW5 stated that he had no samples to show that the accused committed the offence. He stated that his work was to treat PW1 and to tell the court the kind of injuries she sustained.

39. **PW6-No. 84052908 -Corporal Philip Rodoi** of Simenya Administration Police Post told the court that on 30/1/2017 at around 6.00 pm he was at the post with his colleague APC Chima when the Chief Mr. Muliro rang them and informed them that a rape had been committed in Rambo area and that he needed their assistance to arrest the suspect as the suspect was planning to travel to Nairobi.

40. That they rushed to the Chief's Office and accompanied the Chief to the suspect's home that is the home of the accused person but unfortunately the accused saw them from a distance and decided to escape, but that they managed to chase the accused with the help of the members of public and to arrest him at a distance of around 200 metres. That they then arrested the accused and escorted him to the Ugunja Police Station where they recorded their respective statements. He also stated that he never knew the accused before.

41. On **cross examination** he stated that he did not know what town the accused used to live in and he stated that the accused did not surrender himself. He stated that the accused resisted arrest and that when they arrested the accused they had to wait for a vehicle to pick them. He also stated that Simenya AP Post does not have a cell.

## **DEFENCE CASE**

42. The accused was then placed on his defence and given an opportunity to defend himself and he opted to give sworn evidence and to call 2 witnesses.

43. **DW1- SAMUEL OGOLLA OMONDI** told the court that he was aged 32 years and that he was a resident of [Particulars withheld]. He stated that he used to work in Mombasa as an electrical welder. He confirmed that on 29/1/2017, he travelled to [Particulars withheld] to visit his workers so that he could know them.

44. He stated that he asked his workers if they had identity cards but they answered in the negative. He therefore left the workers at his home and went to check on his friends and further that he returned to his home at around 9.00 pm only to find that his workers had already slept. The he then woke the workers up because they had the keys and were supposed to prepare his supper.

45. That after eating his supper, he went to his house and slept till the following morning that is the 30<sup>th</sup> and that as they were taking tea, his brother Robert Odhiambo availed himself and told them that they were going to Simenya and that they were going to return with police officers to which PW2 answered in the affirmative. That upon asking Robert whether someone had wronged him, he (Robert) did not respond. He then stated that before K. (PW2) left, he (DW1) slaughtered a hen and gave it to K.(PW2). He stated that he told Kevin that since K was going to Simenya he should take his (DW1's) phone for charging and K agreed to do so.

46. He further stated that later K.(PW2) went back home alone without Robert and proceeded to the stream to fetch water. He stated that the wife of K.(PW2), L.H was doing laundry and he (DW1) also decided to do laundry. He stated that later between 10.00 am and 11.00 am, he sent K.(PW2) to collect his (DW1's) phone from where he had taken the phone for charging because he needed to travel at 3.00 pm. He further stated that later after 3 minutes K.(PW2) stated that he was heading to Sidindi to collect the phone. It was his testimony too that PW2 took around 30 minutes before coming back and that he asked PW2's wife as to why PW2 had taken long. He stated further that he was seated under a tree reading the newspaper and that PW1 entered the kitchen which is the house he had provided for PW1 and her husband to be sleeping in and after around five minutes, the said PW1 alleged that the dog was leaving with sugar. He stated that he asked PW1 whether dogs eat sugar but that PW1 did not respond instead she continued walking while going upwards and that he thought PW1 was insane.

47. DW1 further stated that PW1 left and did not come back and that he sat there with his friend until it started raining and had to postpone his journey. That after it stopped raining, his friend left him still waiting for K.(PW2). He further stated that later at 6.30 pm many people went to his home and as he did not know who the people were, he walked towards the gate only to hear people saying that he was the one. It

was his testimony that he moved to where the Chief was and asked him what was wrong and the chief told him that he was under arrest.

48. That on demanding to know why he had been arrested and also demanding for proof that the people who wanted to arrest him were police officers, it is at that point that he was forcefully handcuffed and escorted to Sidindi Centre where he was taken to a bar where he stayed for around one and a half hours then the chief brought the complainant and asked him if he knew the said L.H.(PW1). That he answered in the affirmative and stated that PW1 was the wife of his employee. That it is then that he was told that he defiled a minor aged 17 years and was taken to Ugunja Police station where he was interrogated.

49. He also stated that L testified in court that he (DW1) took Robert's chicken and slaughtered it, an allegation which he said was untruthful. He also wondered why he was being arrested for rape, yet the complainant had no idea as to why the police were called and that the complainant's husband also said that the police were called because of family wrangles.

50. Lastly, he added that Robert refused to come to court to tell the court the truth about the police issue and so he closed his case.

### **JUDGMENT OF THE LOWER COURT**

51. The trial court in its judgment reiterated the charges facing the accused person though it cited the provisions of the charge of defilement as opposed to that of **rape**. The court also restated the particulars of the case in its judgment. The trial court correctly stated that the accused person denied the charges and the prosecution in a bid to prove its case called 6 witnesses.

52. The trial court framed the issues for determination being:

**i. whether the accused person herein did on 30/1/2017 have carnal knowledge of the complainant without her consent;**

**ii. whether the accused person therein, on 30/1/2017 did engage in an indecent act with the complainant against her will by touching her vagina with his penis.**

53. The court then stated that the onus is on the prosecution to prove beyond reasonable doubt that on 30/1/2017, the accused while at Sidindi Area in Ugunja sub county within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of LH (name withheld) by use of force or in the alternative that on 30/1/2017, the accused while at Sidindi Area in Ugunja Sub County within Siaya County intentionally touched the vagina of LH (name withheld) with his penis against her will. The court then made the following observations, findings and conclusions:

54. That **Section 3(1) of the Sexual offences Act No. 3 of 2006** provides that **"a person commits the offence termed rape if;**

***(a) He or she intentionally and unlawfully commits an act which causes with his or her genital organs.***

***(b) The other person does not consent to the penetration or***

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

55. Further that **Section 3(3) of the Sexual Offences Act No. 3 of 2006** provide 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."**

56. Further the court stated that **Section 43(1) of the Sexual Offences Act No. 3 of 2006** provides that an act is intentional and unlawful if it is committed;

***(a) In any coercive circumstance.***

***(b) Under false pretences or by fraudulent means of***

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

57. Further that **Section 43(2)(a) of the Sexual Offences Act No. 3 of 2006** provides that the coercive circumstances referred to in *Subsection (1) (a)* include any circumstances where there is use of force against the complainant or another person or against the property of the complainant or that of any other person.

58. That **Section II (a) of the Sexual Offences Act No. 3 of 2006** also provides that **"person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

59. The court noted that out of all the prosecution witnesses, it is only the complainant who witnessed as she was (allegedly) being raped. The court then stated that the issue for determination was thus **whether the uncorroborated visual identification evidence could be relied on by the court** and in determining the same, was guided by the court's decision in **R vs. Turnbull [1976]3XII ER 549** where the court stated that "some of the factors to be considered before determining whether to rely on the visual identification evidence of a single eye witness are as follows:

*1) Whether the viewer viewed the suspect from a close position and under sufficient lighting.*

*2) Whether the viewer had ample time to view the suspect and that there was nothing which could have impeded proper identification.*

*3) Whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect.*

*4) Whether much time had lapsed between the time the viewer saw the suspect committing the offence and the time the viewer identified the suspect to the police.”*

60. And stated that the court in **Turnbull case** further drew a distinction between recognition evidence where the court stated that recognition evidence is more reliable than identification of a stranger. Thus the trial court was of the view that PW1 told the court that on 30/1/2017 at around 10.00am when she was doing laundry in the home of the accused, who was also present at the time. That the accused approached her from behind held her hair and then pulled her backwards occasioning her to fall, that the accused also strangled her with his hands then pulled her into the house of the accused which is a single room, locked the door of the said house from inside the accused forcefully undressed her by tearing off her skirt and inner pant and raped her on the mattress that was on the floor.

61. From the foregoing, the court stated that from PW1's testimony, it was evident that the incident did not take place abruptly and that there was a sequence of events that took place before the complainant was allegedly raped, therefore found that PW1 had ample time to view the offender and it was not just a fleeting glance.

62. Further, that the incident according to PW1 occurred in broad daylight that is at 10.00 am and PW1 never stated that she was blindfolded on that day and neither did she state that the alleged offender wore a face mask hence the court found that she viewed the offender under sufficient lighting and that there was nothing which could have impeded her proper identification. The court added that in its view, according to PW1, the offender was not only close to her but also had bodily contact with her when the offender slapped her, pulled her hair, dragged her on the ground and eventually inserted his penis into her vagina and found that she viewed the offender from a close position.

63. The court further found that according to PW1, PW2 and even the accused, PW1 knew the accused well as the accused was her employer whom she knew for 2 days being that the accused travelled to his rural home on 29/1/2017 to check on his new employees. The court observed that the accused confirmed that he spent the night of 29/1/2017 and the 30/1/2017 with his worker PW2 and PW2's wife, PW1 who is the complainant hence it found that PW1 identified a person she recognized and not a stranger and her description of the accused by his name as seen was not disputed by the accused, adding that it did not take long before she identified the accused to the police, and that in fact she identified the accused to the police on the same day of the offence.

64. The trial court thus stated that, in view of the circumstances under which PW1 identified the offender, the said circumstances met the threshold set in the case of **R vs. Turnbull [1976] 3 ALL ER 549** for relying on the visual identification evidence of a single eye witness thus found that the visual identification of PW1 though uncorroborated was reliable.

65. The court then stated that PW2's narration of the report made to him by PW1 is consistent with the testimony of PW1 made before the trial court and therefore a confirmation that PW1 did not at any time change her version of what transpired. Further, that the testimony of PW1 and PW2 was further corroborated by that of the area chief of South Ugenya location Christopher Otieno Muliro who testified before the court as PW3. The court further stated that PW3's narration of the report made to him by PW1 and PW2 is consistent with the testimony of PW1 and PW2 and that in corroborating the testimony of PW1 and PW2, he confirmed that he was the one who gave PW1 and PW2 KShs. 500 with which they used to travel to Ambira Sub County Hospital on that 30/1/2017 for medical attention.

66. The trial court further found the testimony of PW1 and PW2 that PW1 was raped on 30/1/2017 was corroborated by PW5 the Clinical Officer who confirmed that he examined the complainant on 30/1/2017 for purposes of treatment and also 31/1/2017 for purposes of filling the P3 form. PW5 confirmed that on that 30/1/2017 PW1 went to Ambira Sub County Hospital in the company of a person she identified to be her husband and she had a history of having been sexually assaulted by a person well known to her on the same day on 30/1/2017.

67. Further, that PW5 while corroborating the testimony of PW1 reconfirmed that PW1 had a torn skirt and the court also stated that PW5 confirmed that PW1 had tenderness on the right neck wall that was mildly oedematous and that it had lacerations. PW5 also stated that the left side of the neck wall of PW1 had mild tenderness and it was oedematous and also that the patient's right knee was tender and it had a linear mild oedematous lacerations which injuries he said were occasioned by blunt edged objects and sharp edged objects. To this the court found that the testimony of PW5 corroborated that of PW1 in terms of the nature of the injuries that PW1 sustained and the particulars of the assault and it was the court's view that such injuries could be occasioned by being strangled, being forced to the ground and being dragged against the ground just as stated by PW1.

68. The trial court noted that PW5's report on examination of the genitals of PW1 revealed that the vagina walls and both labias were tender, there was a thick locoid per vaginal discharge on the endocervix of the vagina and that tests done revealed no venereal infection. That PW5 stated in conclusion that the clinical findings were indicative of an earlier possible forceful vaginal penetration that had taken place within 12 hours. To this end, the court stated that it therefore meant that PW5 also found that indeed PW1 was raped. The court then stated that having looked at the exhibits produced by the doctor, it found that the contents thereof were not only consistent with the testimony of the maker but also with the testimony of the complainant.

69. That it was evident from PW5's testimony that force was used against the complainant at the time the perpetrator was using his penis to penetrate the vagina of the complainant and that that in itself is a confirmation of PW1's testimony that she did not consent to the act of sexual intercourse that took place between her and the person she reliably identified to be the accused person.

70. The trial court stated that PW6's only function was that of arresting the accused and noted that his testimony corroborated the testimony

of PW3 in terms of the conduct of the accused as the accused was about to be arrested. Further that the testimony of PW4, the Investigating Officer's narration of the report made to her and what she learnt while conducting investigations and while recording the statements of witnesses was consistent with the testimony of PW1, PW2, PW3, PW5 and PW6 noting that PW4 did proper investigations in the matter.

71. The court then observed that the testimony of the prosecution witnesses was consistent thus found the prosecution witnesses to be credible witnesses.

72. On examining the defence of the accused, the court noted that the accused did not dispute that on that material date that the offence was committed, he was left alone with the complainant at his home and that the complainant was doing laundry as the husband of the complainant PW2 went to collect his (DW1's) phone and that the accused thereby placed himself at the scene of the (alleged) offence and at the time the offence was committed. Further that he also did not dispute that he was well known to the complainant.

73. The trial court also noted that the accused in his defence stated that he was framed up but the trial court found that that defence was just an afterthought as the evidence irresistibly put the accused at the scene of the offence at the time the complainant was raped and irresistibly pointed to the accused as the person who raped the complainant and held the defence to be evasive in that he concurred with PW1 and PW2 on how events unfolded save for their testimony that he raped the complainant.

74. The court also stated that the accused talked of a friend with whom he was with at his home but that he did not tell the court the name of his alleged friend and neither did he tell the court why his friend could not appear before the court to testify despite the fact of being aware that there was overwhelmingly incriminating evidence tendered against him and as such the court formed the opinion that the accused could have been talking about a non-existent witness, hence found that the defence of the accused was a mere denial which did not shake the testimony of the prosecution witnesses in anyway.

75. The court thus held that the prosecution had proved its case beyond reasonable doubt as against the accused/ appellant herein thereby found him guilty of the main charge and convicted him as per **Section 215 of the Criminal Procedure Code**.

76. The court then considered the nature and gravity of the offence which the accused had committed and the mitigating factors in favour of the accused, and noted that the accused did not express remorse and stated that the accused abused the trust placed upon him by society which expected him to treat his employees with dignity and also expected him to be law abiding and in concluding remarks stated that a person with the character of the accused did not deserve to be released to the society until he reformed lest he prey on other persons such as the complainant and bearing in mind the provisions of **Section 3(1) as read together with Section 3(3) of the Sexual Offences Act No. 3 of 2006** sentenced the accused to serve 15 years imprisonment.

#### **APPELLATE SUBMISSIONS.**

77. The appeal was disposed of by way of written submissions under the following subheadings:

**i. Biased and unfair trial amounting to unsound judgment based on misevaluated evidence by inconsistent, contradictory and coached witnesses.**

78. Under this head, it was submitted that the evidence tendered by the prosecution against the accused/ appellant during the trial was hardly enough to prove any case against him and that the trial court misevaluated evidence resulting into complete bias, unfair trial and manifest unsound and fraudulent judgment.

79. It was submitted that the evidence of PW1 was not logical and was also untruthful as she stated in her testimony that the appellant suddenly ambushed her while she was doing laundry within the homestead in a broad daylight on that fateful day, which does not sit well with common sense since it is not clear what prompted the sex romp.

80. Further, that during the whole trial process, it was not indicated anywhere that the appellant was subjected to any mental assessment to confirm any form of mental disability, therefore it was very clear that the appellant was sober enough not to indulge himself in such an activity without the consent of the victim.

81. In addition, the appellant submitted that on the flipside, being that the whole scenario took place in broad daylight, he did not understand why the complainant (PW1) failed to raise an alarm even after sensing danger which shows that the whole story was coached and that as there was no any other eye witness apart from the complainant herself, the learned trial magistrate ought to have looked into such small lapses that could work to the benefit of the accused person.

82. It was further submitted that on cross examination, the complainant (PW1) confessed that the appellant had disagreed with his brother previously before the alleged incident and promised to seek police intervention which according to the appellant confirmed that there had been a domestic conflict between the appellant and his brother and his brother looked to the other party to seek police intervention whatever the circumstances.

83. He stated in submissions that it was the testimony of (PW2) that he was constantly seeking advice from Robert, the appellant's cousin wherever need be and that even on the night preceding the fateful day of 30<sup>th</sup> January 2017, he (PW2) had to seek the intervention of Robert over an issue and also that he (PW2) relied on hearsay.

84. The appellant submitted that it was the duty of the prosecution to prove their case beyond reasonable doubt, but that, to do so it is under obligation to produce as many witnesses as possible in order to prove overwhelming evidence against the accused person hence he wondered why the prosecution failed to called Robert to appear at the trial to testify despite the fact that he was aware of the overwhelming

incriminating evidence the prosecution had tendered against him.

85. Further, that it was upon PW4, the Investigating officer, to prove that indeed the charges against the appellant were appropriate and not rely purely on the testimony of PW1, hence he viewed that the trial learned magistrate erred in fact by failing to consider that investigations do not only involve verbal confessions by witnesses and that the investigation was too shoddy.

86. It was further submitted that the expert witness (PW5) confirmed penetration into the genital organ (vagina) of the complainant and that is why she (PW4) preferred the charge and that this piece of evidence does not beat logical(sic) since PW1 was a married woman to PW2 and the form of penetration was not distinguished in any manner as to be of the husband or not.

87. Further submission was that there was nowhere in the testimony of (PW4) that reveals that the accused person (appellant) was subjected to any medical examination to either connect him to or vindicate him from the alleged offence. He therefore submitted that both investigations and medical examination fell short of the required standard of proof.

88. The appellant further submitted that **Article 50(4) of the Constitution** stipulates that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the admission of justice. He therefore submitted that the admission of all the above evidence obtained in such dubious means aimed towards convicting him was in total infringement and contravention of his constitutional rights and fundamental freedoms to a fair trial and a slap in the face of natural justice. The appellant urged that the appeal be allowed, conviction quashed and sentence set aside or his case be set aside for retrial for justice to prevail.

89. In his oral submissions made in court on 1/10/2018 the appellant submitted that he was not taken for examination yet he was arrested on the same day of the alleged rape. He added that the victim spent the night with the husband. That she was his workman's wife, he also submitted that Robert Odhiambo his cousin was on the charge sheet as a witness but was not called, and so it was his contention that Robert should have been called as he would have told the court the truth.

#### **Prosecution's submissions.**

90. Counsel for the prosecution, Mr. Okachi opposed the appeal, stating that the prosecution had proved its case beyond reasonable doubt. That the victim was a worker of the appellant so identity was not in issue. That there was evidence from the victim and the Doctor who examined her. He thus urged this court to uphold the conviction which was sound and maintained that sentence was lawful and lenient.

#### **DETERMINATION**

91. Having carefully considered the foregoing, in my view, the main issues that flow for determination are:

- 1. Whether the medical evidence was conclusive;**
- 2. Whether essential witnesses to the case were not called i.e. Robert;**
- 3. Whether proper investigations were done;**
- 4. whether the defence of alibi was sufficiently considered;**
- 5. Whether bias was occasioned as a result of alleged conflict;**
- 6. Whether sentence meted out on the appellant was lawful**

**92. On whether the medical evidence was conclusive,** the appellant in his grounds of appeal states that the learned trial magistrate erred in fact and in law by not observing that the medical examination herein fell short of the required standard of proof. However, PW5 in his evidence produced the patient's treatment notes and P3 form and clearly stated the date the patient went to Ambira sub county hospital which was on 30/1/2017 and added that her skirt was torn. He also confirmed that he did both physical examination and examination of the genitalia and his findings were that when he physically examined the patient, he noted that the right neck wall was tender, slightly swollen and it had lacerations. The left side of her neck wall had mild tender oedema and the right knee had a tender linear mild oedema, lacerations and on examination of the genitalia of the complainant, the vaginal walls were tender, the labias were tender, and there was a whitish locoid per vaginal discharge on the endroitus of the vagina.

**93.** PW5 further testified on the time span within which the alleged forcible penetration occurred and it was his conclusion that the clinical findings were indicative of an earlier (within 12 hours) possible forceful vaginal penetration with bodily harm.

**94. In my humble view, there was more than sufficient medical evidence** proving the elements of the charge. Albeit PW5 did not do a medical examination on the Accused/Appellant, this does not discard the findings of PW1's examination as the perpetrator was a person well known to the victim and he (the appellant) did not dispute being with the victim on the material day. Accordingly, I find and hold that the medical evidence was conclusive.

**95. On whether essential witnesses to the case were not called i.e. Robert,** the Appellant in his submissions states that in the discharge of its duty, the prosecution is to prove any case beyond reasonable doubt, but added that, to do so it is under an obligation to produce as many witnesses as possible in order to prove overwhelming evidence against the accused person hence he wondered why the prosecution failed to

call Robert to appear at the trial to testify despite the fact that he was aware of the overwhelmingly incriminating evidence the prosecution had been tendered against him.

**96. This court is alive** to the fact that the prosecution is bound to call witnesses even if their testimony may be adverse to the case. In **Bukenya vs Uganda (1972) EA 549**, it was held that failure to call a crucial witness by the prosecution entitles the court to make an adverse conclusion against the prosecution's case and acquit the accused person. In the said case the court expressed itself thus:

*“The prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with its case.”*

97. The court addressed itself further that:

*“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.*

*(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.*

*(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.*

98. In other words, the test here is whether the prosecution has proved all the ingredients of a charge to the required standard of proof which is beyond reasonable doubt. If the answer is in the affirmative, then there need not be more to be done.

99. However, Section 143 of the Evidence Act provides:

*“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.”*

100. The legal principle in the case of **Keter v Republic 2007 EA 135** is particularly appropriate. The court held:

*“That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt.”*

101. In addition, **Section 124 of the Evidence Act** is to the effect that in criminal matters relating to sexual offences, the court if satisfied the victim is telling the truth shall proceed to convict, in essence, there needs not be any other witness. The section provides;

#### **S 124. Corroboration required in criminal cases**

*“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*

**102.** In the present appeal, the court observes, firstly, that the accused/ appellant whether by design or ignorance thereof confirms in his submissions reiterated above that indeed there was overwhelmingly incriminating evidence that the prosecution had tendered against him.

**103.** Although the appellant states that Robert would have said the truth which would have had the effect of exonerating him (the accused) the view of this court is that the value of the evidence that Robert would adduce is not disclosed and indeed, if the appellant saw that the evidence to be adduced by the prospective prosecution witness would have been in favour of his defence then he was at liberty to have called the said Robert. The fact that he did not deem it fit to call him as a witness despite the overwhelming evidence against him leaves the court at a loss on the intention he sought to achieve by stating that Robert ought to have come in as a prosecution witness because in my view, the prosecution had evidently discharged its burden of proof in the case beyond reasonable doubt.

**104.** In this court's view, the prosecution satisfactorily discharged the burden of proving the main elements of a charge hence there was no need to unnecessarily burden the court by availing as many witnesses as possible whose effect would be to reiterate, add or exaggerate what has already been stated.

105. Accordingly, I find and hold that Robert was not a crucial witness to the case thus his absence is not fatal to the determination of the case.

**106. On Whether proper investigations were done,** the Appellant in his Appellate submissions states that it was upon PW4, the Investigating officer, to prove that indeed the charges against the appellant were appropriate and not rely purely on the testimony of PW1, hence he was of the view that the learned trial magistrate erred in fact by failing to consider that investigations do not only involve verbal

confessions by witnesses and that the investigation was too shoddy. He adds that there is nowhere in PW4's testimony that reveals that he the accused person (appellant) was subjected to any medical examination to either connect him to or vindicate him from the alleged offence.

107. On this issue I will reiterate the position held by the trial court magistrate who held that the investigation officer was thorough in her work. The trial court correctly observed that PW4 did proper investigations in the matter and stated that she did not just rely on the complainant's version of what transpired but also engaged an expert witness i.e. PW5 who confirmed that upon examining the entire body of PW1 there was evidence of injuries on her body as well as her genitalia which was evidence of forceful vaginal penetration.

108. In addition, PW4 while giving testimony, identified the P3 form of the accused as PMF1 1b and on **cross examination**, she said that she also looked at the P3 form prepared by the doctor and that she even visited the scene after the accused was arrested. She even went the extra mile of checking on the window that the complainant referred to in her testimony and confirmed that the window where the complainant was peeping was opposite the kitchen. Accordingly, I find and hold that PW4 gave the case the due attention it deserved and acted diligently in evaluating the evidence on record as adduced by the prosecution and the defence.

**109. On whether the defence of alibi was sufficiently considered**, on this issue I take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi. See **Ssentale vs. Uganda [1968] EA 36-**. The foregoing was restated in the case of **Wang'ombe vs. Republic [1976-80] 1 KLR 1683** where it was stated:

*“the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt.”*

110. However, this defence should also be raised at the earliest opportune time as was held in the case of **R VS SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6EACA 145** that:

*“ if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”*

111. The Appellant in his defence stated that after eating his supper, he went to his house and slept till the following morning that is the 30<sup>th</sup> and as they were taking tea, his brother Robert Odhiambo availed himself and told them that they were going to Simenya, and he also told court that Robert refused to come to court to tell the court the truth about the police issue.

112. While the trial court in considering the accused's defence in the judgment stated that the accused in his defence stated that he was framed up but found that that defence was just an afterthought as the evidence irresistibly put the accused at the scene of the offence at the time the complainant was raped and irresistibly pointed to the accused as the person who raped the complainant and held the defence to be evasive. This was an observation of the demeanor of the appellant as he testified on oath and therefore this court has no reason to doubt the trial court's finding of fact.

113. The trial court further noted that the accused talked of a friend with whom he was with at his home but did not tell the court the name of his alleged friend neither did he tell the court why his friend could not appear before the court to testify despite the fact of being aware that there was overwhelmingly incriminating evidence tendered against him and as such the court formed the opinion that the accused could have been talking about a non-existent witness, and found that the defence of the accused was a mere denial which did not shake the testimony of the prosecution witnesses in anyway.

114. To this end, I agree that the prosecution did prove their case beyond reasonable doubt and further, looking at the second limb of the above cited case of **R VS SUKHA SINGH** the appellant did not give the prosecution an opportunity of inquiring into that alibi so as to be satisfied to its genuineness as he never saw to it that Robert was called as his witness to support his contentions and as such his supposed defence of alibi remains a fallacy.

**115. On whether bias was occasioned as a result of conflict**, the appellant in his grounds of appeal stated that the learned trial magistrate erred in facts and in law by failing to consider that there existed a filial grudge that resulted into the allegations. However, I note that the accused/appellant did not at any point in time bring this up in cross examination and the only misunderstanding he talks off is that which is between him and his brother and not the prosecution witness, which I opine is totally unrelated to the issue at hand.

**116.** Further was the appellant's contention that there were inconsistencies. However I agree with the trial court's finding that the prosecution witnesses were consistent and hence credible. The trial court did not use any contradictory evidence to the disadvantage of the appellant. I find no bias demonstrated.

117. On sentence, I find that the same was lawful and the trial considered the appellant's mitigations before sentencing him. The same was appropriate in the circumstances as the appellant left his wife in Kisumu and travelled to the rural home to sexually molest his worker's wife which is unacceptable. He used violence and caused her other physical bodily injuries as shown in the P3, apart from the actual sexual assault. On many occasions, such offences lead to crimes of passion. The appellant is lucky that the complainant's husband did not find him in the actual act of raping his wife. It would be a different story altogether, the crime of passion.

**118.** Consequently, and in light of the foregoing, the appeal herein is found to be devoid of merit and is hereby dismissed. The conviction and sentence meted out on the appellant by the trial court is upheld. The appellant to serve sentence as meted out.

**Dated, Signed and Delivered in open court at Siaya this 3rd Day of December, 2018.**

**R.E ABURILI**

**JUDGE**

**In the presence of:**

Appellant in person

Mr Okachi for State

CA: Brenda and Modestar