IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 167 OF 2019

BETWEEN

KENNEDY BABU KAIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 12th March, 2019

in

HC. CR. A. No. 154 of 2018)

****

JUDGMENT OF THE COURT

This is a second appeal. **Section 361 (1) (a) Criminal Procedure Code** mandates this Court on such an appeal to consider issues of law only and not to go back to matters of fact that have been tried by the trial court and re-evaluated by the 1st appellate Court. In the case of **M'Riungu vs Republic [1983] KLR 455** this Court observed of that mandate:

> ***" ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.".***

We shall revisit the record not to restate the facts but to see whether the trial court and the 1st appellate court carried out their mandates as required in law.

The appellant, **Kennedy Babu Kairu**, was arraigned before the Chief Magistrate's Court at Kibera for the offence of rape contrary to **Section 3 (1) (a)** as read with **Section 3(3)** of the **Sexual Offences Act** particulars being that on the 14th day of July, 2007 in Nairobi he intentionally and unlawfully committed an act which caused penetration with his male genital organ into the female genital organ of **JW** (PW1 – **W**) without her consent. There was an alternative charge of Indecent Act with an adult contrary to **Section 11 (6)** of the said **Act**, particulars being that on the 15th day of the said month at the said place he committed an Indecent Act with **JW** by touching her private parts namely vagina, breast, buttocks using his hands without her consent. On count 2, the charge was assault causing actual bodily harm contrary to **Section 251** of the **Penal Code,** particulars being that on the 15th day of July, 2007, at the said place he willfully and unlawfully assaulted **JW** thereby occasioning her actual bodily harm. Count 3 related to a charge of malicious damage to property contrary to **Section 339 (1)** of the **Penal Code**, particulars being that on the 5th day of July, 2007 at the said place he unlawfully damaged **JW's** blouse, bra and jeans trouser all valued at Kshs.3,500.

The trial which took very long to be concluded began **before Mrs. Wanjala**, Principal Magistrate, who took the testimony of **JW** on 29th February, 2008. The hearing was then adjourned and **JW** was cross-examined on 20th November, 2008 before the said Magistrate. Cross-examination was not completed on that date. The hearing was subsequently adjourned on various dates. There is an order made on 24th February, 2009 by **Mrs. M.A. Odero**, Chief Magistrate (as she then was) that hearing start de novo as **Mrs. Wanjala** had proceeded on study leave.

On 30th March, 2009 counsel for the (accused) appellant appearing before **Mrs. Odero** stated:

> ***"We waive our right to a de novo hearing. We shall proceed from where trial court left off."***

The Magistrate recorded an order to that effect and stated that **Section 200 Criminal Procedure Code** had been complied with.

Then the matter went before Chief Magistrate **U.P. Kidula** who reconsidered the whole issue – the Magistrate who took **JW's** testimony had proceeded on study leave and the Magistrate who made "de novo" order had been elevated to a Judge of the High Court. Having considered that concatenation of events the Chief Magistrate observed:

> ***"….. I still find that apart from those circumstances there is the issue of the demeanor of the complainant in this case ... It is imperative that the trial court sees for itself and makes a decision based on the demeanour of the complainant given that the offence is a personal (sic*) nature maybe without any witnesses present ….."**

Having reached that conclusion, the Magistrate ordered a de novo hearing and she took testimony of the 3 prosecution witnesses but was then transferred to Bungoma. The matter was then briefly handled by Chief Magistrate **C.M. Githua** who was soon appointed a Judge of the High Court but before the appointment the Magistrate had indicated that Section 200 of the Criminal Procedure Code had been complied with, counsel for the appellant stating that the appellant wished to proceed without recalling any witness. By an interesting twist **Mrs. Wanjala**, who initially took **JW's** testimony, came back on the scene on 28th May, 2013 (about 5 years after she had taken **JW's** testimony). She granted various adjournments on applications by the prosecution and the defence and on 29th September, 2013, the prosecution being unable to avail more witnesses, the Magistrate ruled that a prima facie case had been established thus the appellant was put on his defence.

The importance of that history of the matter will soon be seen in this Judgment.

JW testified before Chief Magistrate **Mrs. Kidula** that she knew the appellant well as she had worked in the same organization with his wife and had interacted with him in the course of work and in social circles. He worked in the insurance sector and she was a human resource person. On 14th July, 2007, her being out of work she communicated with the appellant (through telephone and SMS) asking him about openings in the insurance world. They agreed to meet that evening and when she arrived at Galileo, a club in Westlands, at about 6 p.m. she found him there. They sat at a table and she told him that she had requested the meeting as she needed his help to find a job. She was lucky, or so it seemed, as he knew a lady who wanted to employ a human resource person. He telephoned the lady and even put the call on speaker-phone so **JW** could hear the conversation. The lady on the other end stated that she would join them at Galileo and so they waited and in the meantime, they took drinks, **JW** a soft one, the appellant beer. It reached 11 p.m. but the lady had still not arrived. The appellant informed **JW** that he had been invited to a party at a club called Alfajiri in Kilimani area and she requested her whether she could join him and go to go there where the unnamed lady would join them? **JW** agreed; they boarded the appellant's car and he drove to Alfajiri where a party was on. They now both took hard liquor; they probably danced until 2 a.m. or thereabouts when **JW** was concerned by the late hour and she wanted to take a taxi home. The appellant would hear none of that and he offered to drive her home (South C) but when they boarded his car he informed her that he needed to first pick something at his house on Kirichwa road in Kilimani. They drove there and when **JW** wanted to remain in the car the appellant told her that it was unsafe for her to do so at that late hour. They entered the house and she remained in a corridor downstairs while he kept walking upstairs and downstairs – this concerned her and she decided to leave. The main door was locked so she looked for another door which she found in the kitchen. As she struggled to open this door she was surprised when the appellant kicked her from behind and when she turned he kissed her on the lips. She bit his lips which infuriated him and that is when the beating began. He dragged her to the living room while pummeling her with his fists and every time she screamed for help he would beat her even more while swearing that he would kill her. He ripped off her shirt and the buttons flew off; he ripped off her bra and pressed her breasts. Then he tore off her jeans trouser and dragged her upstairs where he threw her on a bed; fetched a condom from a drawer and proceeded to penetrate her using his fingers and penis. According to her the ordeal took long and when he was done, he promptly fell asleep. She waited for a while and when she was sure that he was asleep she left the bedroom, wore her torn trouser now only supported by a belt, fetched a jumper from the bedroom and was able to open the main door after finding a key. She found a night guard at the gate who informed her that she was in Kilimani. On exiting the gate, she saw Kilimani Primary School and she now knew her surroundings which enabled her to call her boyfriend, **NHT (PW2 – H),** who came and rescued her. He was accompanied by another unnamed man in a car and they all went back to the appellant's house where they found him still asleep. They woke him up after confronting him and he was told that it was a police case. They left the appellant in the house and proceeded to Kilimani Police Station where as they were making a report the appellant appeared; **JW** identified him to the police as the person who had raped her and he was promptly arrested and put in the police cells. Thereafter, **JW** was attended to at Nairobi Women's Hospital and ongoing back to the police station she accompanied police and the appellant to the appellant's house where buttons from the torn blouse or shirt and jeans were recovered. These items plus jeans with zip ripped off, a torn bra, a jumper and clothes recovered in the appellant's house were identified and marked for identification as was a report from the said hospital. Also marked was a P3 form.

JW, who underwent rigorous cross-examination, denied that the report she had made to police against the appellant was false and trumped up to assist the appellant's wife in a divorce case she had filed against the appellant. She further denied that she and NHT had made a monetary demand from the appellant so as to drop the case. Of the clothes she was wearing to the police station that morning she said:

> ***"This is correct I had changed my clothes' my (sic) people brought me a change of clothes. There is no reference in my statement to my people having brought change of clothing to me ….."***

Further, that she changed clothes in the car NHT had come in to rescue her.

NHT testified how in the morning of 15th July, 2007 (5.30 a.m.) **JW** texted him and upon him calling her she informed him how she had been assaulted and raped. He woke up an unnamed neighbor and they drove in the neighbour's car to Kilimani where they found her with a swollen face and part of her hair was missing. They went to the appellant's house, woke him up but he denied what **JW** was alleging. They went to the police where the appellant showed up moments later. In cross-examination he stated that when he found **JW** she was in the same

clothes she had left the house in – he denied that she changed clothes in the car and he could not recall getting any clothes for JW from the house.

Dr. Zephania Kamau of Police Surgery examined **JW** on 17th July, 2007. He noted an injury to the lower eye lid, swelling on the right side of the back of the head and she complained of pain in the throat, chest, lower abdomen and pubic area. Injuries were caused by a blunt object. He further testified that **JW** had been seen at Nairobi Women's Hospital and her genitals were found to be normal. He produced the P3 form as an exhibit in the case. Shown under cross-examination the report from the said hospital, he stated:

> ***"This report shows there was no tear on area surrounding the vagina area. Then a fresh hymenal tear at 12 and 3 o'clock position is what the report from Nairobi Women hospital says. This is quite surprising. There is no hymen at the 12 O'clock phase of the clock. Hymen can only be found at 8 and 4 phase of the clock. For there to be fresh hymenal tear it is impossible for one who has already given birth even if it was through insemination ….."***

The evidence of the Doctor was taken on 27th October, 2010 after which the trial was adjourned to enable the prosecution to call other witnesses – a doctor from Nairobi Women's Hospital, an investigations officer and another police witness. An application for amendment of the charge sheet was allowed by **C.W. Githua**, Chief Magistrate in a ruling dated on 26th July, 2011 and the matter was mentioned and adjourned many times by a number of magistrates including **Mrs. J. Wanjala**, Chief Magistrate who had initially taken **JW's** testimony and had resumed duty after a study leave. On 29th September, 2013 (we remember here that the plea was taken on 24th July, 2007 – so that over 6 years had passed) the said Magistrate refused to entertain any further adjournments. She considered the record and held that the prosecution had adduced sufficient evidence and the appellant was put on his defence.

In sworn testimony taken on 9th March, 2015 by the said Magistrate the appellant, a businessman who dealt in motor vehicles, agreed that he had been in communication with **JW**. He stated that she called him repeatedly and he invited her to Club Galileo where they proceeded to share alcoholic drinks; they later went to Alfajiri where **JW** was taking Johnie Walker whisky and dancing. At 4 a.m. they went to his house which **JW** had visited often

– **JW** continued taking whiskey which was in his house but because he was tired he left her downstairs and went upstairs to sleep. At 5.45 a.m. he was rudely woken by **JW** and 3 men who alleged that he had raped her – they demanded Kshs.200,000 in default they would report a rape case to police. He denied all the charges stating that he had himself driven to Kilimani Police Station where, as he was about to make a report, **JW** and the men arrived and made the rape report. According to him the charges were fabricated by his estranged wife with whom he was undergoing a divorce. Of the report from Nairobi Women's Hospital which showed that he raped JW between 7 – 11 p.m. – he denied this stating that they were at Club Galileo at that time.

At the end of that sworn testimony it is recorded by the trial magistrate:

> ***"Prosecutor: We shall not be able to cross examine because. (sic) I was not present when witnesses testified and I do not have the police file. I am not in a position to cross examine him."***

There were then adjournments to call a defence witness but this was not to be and judgment was reserved for 25th May, 2015. In a judgment delivered on 1st August, 2018 by **E.N. Juma**, Senior Principal Magistrate on behalf of **Mrs. Wanjala** the appellant was convicted on the 3 main counts and sentenced, on count 1 to serve 10 years imprisonment; on count 2 – to pay a fine of Kshs.10,000 in default to serve 1 year imprisonment and on "the Alternative Count" to serve 2 years imprisonment. There is no indication whether these were concurrent or consecutive sentences.

The appellant appealed to the High Court but **Kimaru, J**. in a Judgment delivered on 12th March, 2019 did not find merit in the appeal and dismissed it; findings which have provoked this appeal and whose reasons we shall revert to at a later stage of this judgment.

There are 10 grounds of appeal set out in the Memorandum of Appeal drawn by the appellant's lawyers, **M/s. Onyango Oloo & Magina** Advocates. These may be summed up as follows: the Judge is faulted for holding that the sentence on the **"alternative count"** was actually a sentence for count 3; the Judge is faulted for upholding the conviction when the appeal before him had been conceded by the State; that multiple material witnesses had not been called by the prosecution; that the Judge erred in disregarding the defence offered by the appellant; that the Judge erred in not considering that exhibits were not produced before the trial court; that there were material contradictions in the prosecution case; that the Judge should have considered the possibility of collusion between **JW** and the appellant's former wife, and, finally, that the conviction was unsafe. We are therefore asked to allow the appeal.

When the appeal came up for hearing before us learned counsel **Mr. Magina** appeared for the appellant, while the learned State Counsel **M/s. Wang'ele** appeared for the respondent. Counsel for the appellant had filed written submissions and in a highlight counsel submitted that it was wrong for the trial court to convict on a main count and also on an alternative count. According to counsel the High Court did not evaluate the evidence as it was required to do in a first appeal. Counsel further submitted that crucial witnesses were not called by the prosecution and the trial court should have inferred negatively against the prosecution for that failure. Further, that documents marked for identification were not produced but the trial court referred to those documents in its judgment.

In opposing the appeal **M/s. Wang'ele** submitted that reference to count 3 as "alternative count" was an error curable under **Section 382** of the **Criminal Procedure Code** and no prejudice was occasioned to the appellant by that reference. According to him, concession of the 1st appeal was of no moment in this appeal and on failure to call witnesses named in the trial was not fatal to the prosecution case.

In a brief reply Mr. Magina submitted that there was no evidence that JW had been raped at all.

We had at the outset identified our mandate in a second appeal being confined to a consideration of issues of law only.

Are there such issues raised in this appeal?

We have considered the record and have identified issues of law as follows: was the High Court right in holding that the sentence on **"alternative count"** was a typographical error? What was the effect of not calling some witnesses and in failing to produce exhibits marked for identification at the trial? Was the defence properly considered? Were there contradictions in the prosecution case? Was the case proved to the required standard in law?

Alternative Count

The appellant was charged on 3 main counts**. A**s we have **already** indicated above there was an alternative count to Count 1 – Indecent Assault. The Magistrate who delivered Judgment issued sentences in respect of Count 1, Count 2 and **"Alternative Count"**. The Judge on first appeal did not make much of this merely stating:

> ***"In what the trial court referred to as alternative count (but was in fact the third count) ..."***

The appellant complains that the Judge was wrong to so hold but the State maintains that the issue is curable under **Section 382 Criminal Procedure Code**.

The appellant took a plea on the 3 main counts and the alternative count. He underwent the trial that took many years and he fully understood the charges that faced him. Upon a full consideration we agree with the State that the appellant was in no way prejudiced by the sentence being referred as alternative count when the trial Magistrate meant to sentence him on count 3. The complaint in this respect has no merit and is dismissed.

Effect of Not Calling Witnesses and Not Producing Exhibits

The prosecution called 3 witnesses: **JW** (alleged victim of rape); NHT (her fiancé) and a doctor who examined her and produced a P3 form.

The prosecutor stated before the trial court that he was to call 3 other witnesses – a doctor from Nairobi Women's Hospital; the Investigations Officer and another police witness. They were not called for reasons explained to the trial court by the prosecution. The appellant was charged on Count 1 with the offence of rape. It was JW**'s** testimony that she met the appellant at Club Galileo where they spent the evening; they relocated at 11 p.m. to another club, Alfajiri, where they made merry by having drinks and at about 4 a.m. they went to the appellant's house where the appellant was to collect an unnamed item. According to her the appellant attacked and raped her in the house. The appellant denied this stating that he had known **JW** for a long time; that she had visited his house often and that on the fateful night he drove with **JW** to his house at 4 a.m. and, feeling tired, he left her enjoying whisky in the living room but himself retired to bed.

In the Judgment the **trial** Magistrate held:

> ***"The complainant testified twice in this case. She testified before me on (sic) and she testified before Hon. Kidula. On both occasions she was cross examined by the defence counsel. She seemed to be steadfast in the testimony."***

The **trial** Magistrate proceeded to refer to the evidence she had recorded before she proceeded on **study** leave and also the evidence recorded by the Chief Magistrate, **Kidula**.

It will be recalled that when **Mrs. Wanjala** proceeded on study leave and the trial was taken over by **Mrs. Kidula**, although the defence stated that the case should proceed from where it had reached under Section 200 Criminal Procedure Code the incoming Magistrate, in a ruling delivered on 11th August, 2009 held, correctly we think, that because Count 1 related to a sexual offence:

> ***"…. It is arguably imperative that the trial court sees for itself and makes a decision based on the demeanour of the complainant given that the offence is of a personal nature maybe without any witnesses present ..."***

Section 124 of the **Evidence Act** requires that for a conviction to be entered against an accused in a criminal case there should be corroboration of that evidence:

> ***"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."***

In the case before the trial court **JW's** evidence on the allegation of rape stood alone. The doctor who received her at Nairobi Women's Hospital did not testify in the case and items allegedly collected from the appellant's house were not produced in evidence as exhibits as the investigations officer was not called as a witness. Section 143 of the Evidence Act provides explicitly that:

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

It was held in the case of **Bukenya & Others v Uganda** (**1972**) **EA 549:**

> ***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

The prosecution in the case before the trial court did not explain why the Doctor at Nairobi Women's Hospital (or a colleague) was not called to testify on findings made upon examining **JW**. The Investigations Officer was also not called and no explanation was given for this failure. We think that the Judge on first appeal should have given this issue more consideration especially when it is explicit from the record that on 30th July 2013 when the adjournment was refused the prosecutor simply stated that they were unable to avail the said witnesses to testify.

In the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR,** the court expressed itself as follows on the issue of a trial court relying on a document marked for identification but not produced as an exhibit in the case:

> ***"In our view, the trial Judge erred in evaluating the evidence on record and basing his decision on "MFI2" which was not a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them."***

The Investigations Officer in the case was not called as a witness. It is true that failure to call the officer who investigates a case is not fatal to the prosecution case but in cases where such evidence is key in linking the accused to the crime, failure to call the investigating officer will cause irreparable damage to the prosecution's case. However, where evidence of other witnesses is sufficient to secure a conviction, failure to call the investigating officer will not do harm to the prosecution case. The Supreme Court of Uganda had this to say of that issue in **Alfred Bumbo & Others v Uganda Criminal Appeal No. 28 of 1994 (UR):**

> ***"While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge."***

This Court in the case of **Julius Kalewa Mutunga v Republic [2006] eKLR** stated:

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."**

On the whole evaluation of the record and considering the charges appellant faced at the trial we think that the prosecution should have availed the investigating officer to produce the exhibits and either the doctor herself or another doctor familiar with her handwriting from Nairobi Women's Hospital to produce the initial medical report on the complainant.

There was reference in the trial of a night guard at the gate of the appellant's house who even had a conversation with **JW** when she left the appellant's house. There was also a neighbor who drove NHT that morning. These were crucial witnesses who we think should have been called to shed light on the condition **JW** was in soon after leaving the appellant's house after commission of the alleged rape against her.

The other issue concerns the trial Magistrate referring to testimony she had recorded before the hearing was ordered to start de novo. In the case of **Daniel Karuma alias Njaluo v Republic [2015] eKLR,** this court expressed itself as follows**:**

> ***"Finally, we note that although the trial magistrate heard the case de novo, in her judgment she made reference to evidence adduced before the previous magistrates in order to satisfy herself of the consistency of the testimony before her. This was wrong, as the essence of a de novo hearing is that the matter commences afresh and no reference can be made to the previous proceedings, as they cease to exist in so far as the new trial is concerned. However, this slip by the trial magistrate was an inconsequential infraction, as the evidence before the trial magistrate could stand-alone without reference to the previous proceedings. The bottom line is that the prosecution had discharged the burden of proof as there was sufficient evidence adduced that could sustain the appellant's conviction."***

In **Ndegwa vs. Republic [1985] KLR 534,** the court made observation as follows:

> ***"It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation"***

In this appeal, it is our view that the Hon. Magistrate's observations in excerpts of portions of the judgment that:

> ***"The complainant testified twice in this case. She testified before me on (sic) and she testified before Hon. Kidula. On both occasions she was cross examined by the defence counsel. She seemed to be steadfast in the testimony."***

and

> ***"The complainant's testimony coupled with the doctor's testimony and the complainant's torn clothes that were shown to the court proved that indeed the prosecution established to the required standard of proof beyond reasonable doubt that the appellant raped the complainant."***

are a clear indication that appellant's conviction was largely based on the demenour of JW by use of the words "she seemed to be steadfast in the testimony".

In light of the observation in the **Ndegwa vs. Republic cas**e [supra] both testimonies of JW could not be used to gauge her demeanour for purpose of conviction by the convicting magistrate because that taken by Hon. Wanjala who subsequently resumed the trial of the matter and ultimately wrote the judgment resulting in the appellant's conviction was rendered of no effect by the order of Hon. Kidula to have the matter restart *denovo*. Likewise, that taken before Hon. Kidula could not apply for the same reason that she was not the convicting magistrate.

In light of the above reasons, we find justification in the appellant's complaint that the first appellate judge did not properly evaluate and appreciate the impact of the complainant's evidence on the prosecution case.

Was The Defence Properly Considered

We have summarized the sworn defence offered by the appellant which was not challenged as the prosecutor stated that he could not cross-examine the appellant as he was new to the case.

The learned Judge on first appeal believed JW's testimony and that of Dr. Kamau stating:

> ***"The complainant's testimony coupled with the doctor's testimony and the complainant's torn clothes that were shown to the court proved that indeed the prosecution established to the required standard of proof beyond reasonable doubt that the appellant raped the complainant."***

There was not much more said of the appellant's defence.

We have already shown (the case of **Kenneth Nyaga Mwige** (supra) that it was wrong for the trial court to rely on items marked for identification which were not produced as exhibits. The learned Judge on re-evaluation of evidence fell into the same error as committed by the trial court for the failure to properly appreciate the impact of this default on the weight to be attached to the prosecution case whose success was largely dependent on JW's evidence.

The appellant explained in unchallenged sworn evidence that it was **JW** who had sought his company; that she joined him at 2 different clubs where they were together from 7 p.m. on 14th July, 2007 to the morning of the following day. They enjoyed drinks and according to the appellant, when they went to his house **JW** continued drinking whisky which she found in the (appellant's) living room. He denied committing the offence and even pointing out absence of or contradictory medical evidence produced by the prosecution. As stated the appellant gave a sworn statement and was not cross-examined on it. Failure to cross-examine an accused person who has given sworn testimony is not fatal to the prosecution case. Though that evidence remains uncontroverted, the evidence on record should be examined as a whole and the Court must decide whether the accused person's evidence raises any doubt in the prosecution's case – See the persuasive case of the High Court in **John Mwangi Macharia v Republic [1976] eKLR.** Dulu, J, in the High Court case **Hajir Boru Abdhula v Republic [2017] eKLR** held that the effect of failure to cross-examine the appellant and his witnesses left that evidence uncontroverted. With respect, both courts below did not give the appellant's defence the consideration it deserved.

Were There Contradictions in The Prosecution Case

In the case of **Pius Arap Maina v Republic [2013] eKLR,** the Court stated *inter alia* that:

> ***"It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."***

In **Joseph Maina Mwangi v Republic [2000] eKLR,** the Court held *inter alia* that:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."***

In **Njuki v Rep [2002] 1 KLR 77**, the Court held *inter alia* that:

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

accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".

The manner of dealing with alleged existence of discrepancies and inconsistencies in prosecution's case on appeal has been crystalized by the Court in numerous pronouncements. See the case of **Samuel Wambua Muthoka versus Republic [2017] eKLR**, where in, the Court stated as follows:

> ***"The position in law on such alleged existence of inconsistencies, contradictions and discrepancies in the prosecution case is as was stated in the case of Njuki & 4 others versus Republic [2002] 1KLR 771, namely, that where such allegations are raised, the obligation of the Court is to determine as to whether the said discrepancies, contradictions and inconsistencies are of such a nature as would create doubt as to the guilt of the accused. Where they do not, then they are curable under section 382 of the Criminal Procedure Code."***

According to **JW** her fiancé, NHT, brought her clothes which she changed in the car NHT and the neighbor arrived in. NHT denied this stating emphatically that he did not fetch or carry any clothes.

Dr. Kamau was surprised that the report by Nairobi Women's Hospital talked about a hymenal tear at 12 and 3 O'clock stating that hymen could only be found at 8 and 4 phase of the clock. Further, that it was impossible for a woman who had given birth to have a fresh hymenal tear.

In light of the threshold in the case law reviewed above, we find these were material contradictions in the prosecution case and the learned Judge on first appeal was wrong not to identify or discuss them.

Was The Case Proved to The Required Standard?

For all the above reasons we are of the respectful opinion that the case was not proved to the required standard. The convictions were unsafe. The appeal is hereby allowed; the conviction quashed and the sentences set aside. The appellant will be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of August, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

……

JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR