Stephen v Republic (Criminal Appeal 71 of 2021)
[2022] KEHC 15478 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEHC 15478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 71 OF 2021

GV ODUNGA, J

OCTOBER 6, 2022

BETWEEN

BRADLEY OCHIENG STEPHEN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence of the Hon. R. W. Gitau, RM dated 30th September, 2021 in Mavoko Chief Magistrate's Court in Sexual Offence Case No. 51 of 2020)

JUDGMENT

1. The appellant, Bradley Ochieng Stephen, was charged, convicted and sentenced by the Chief Magistrate's Court at Mavoko with the offence of rape c/sec 3(1) as read with section 3(3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on October 5, 2020 in Athi River sub county, within Machakos county, he intentionally and unlawfully caused his penis to penetrate the vagina of LNW, aged 20 years without her consent.

2. He also faced an alternative count of committing an indecent act c/s 11(A) of the *Sexual Offences Act*. The particulars were that on the same day at the same place, the appellant intentionally and unlawfully touched the breast and vagina of LNW against her will.

3. After hearing the evidence, the appellant was convicted of the man charge and was sentenced to serve ten years imprisonment.

4. In support of the prosecution's case, four witnesses were called.

5. The complainant who testified as PW1 stated that on September, 2020 between 12pm and 1pm, after walking for some time, she got tired and decided to sit down and rest. Behind her were some people who were playing football. She was approached by a person who introduced himself as Bradley Ochieng alia Paul and that he was working at Bakita School. The person, now the appellant herein, sought from

her whether she was looking for a job. Though she replied in the negative she informed him that she would not mind taking one.

6. The appellant informed the complainant that she was residing about 2km from the complainant's home and offered to show her where he lived after the complainant declined to go to his house. From a distance the appellant showed the complainant his house and they parted ways. On October 4, 2020, the appellant called the complainant and informed her that the prospective employer was waiting for her in the appellant's house. After inform her sister, CW that she was going to look for a job, she went to the appellant's house and the appellant informed her that the prospective employer had just left and asked the complainant to wait but the complainant declined to do so. The appellant communicated with a person on phone in Luo language which the complainant did not understand. At the request of the complainant, the appellant gave her the number of the said prospective employer and when the complainant called the number, the person who received it told her to wait for him as he was on his way. After waiting for long he called again the said number and the person told him to go home but the appellant insisted that she should wait for the person.

7. According to the complainant she waited till 7pm and when she wanted to leave, the appellant locked the door and became harsh and started beating her. Eventually the appellant pushed her to the bed and with the volume of the road increased, the appellant tore her clothes forcefully after the complainant refused to undress. Though the complainant screamed no one responded. According to the complainant the appellant lived in a one roomed house in a plot of 4 houses but the other houses were unoccupied.

8. After removing the complainant's clothes as well as his own clothes, the appellant raped her in her vagina three times despite the fact that she cried till morning. At 5.30am the appellant allowed the complainant to leave after she lied to him that she had to go for work. According to the complainant, the appellant also inserted his fingers in her vagina. During the process, the complainant felt pain and bled.

9. In the morning the appellant escorted the complainant for a while before leaving her and asked her whether she would return but the complainant did not respond. Upon her arrival at home, she narrated the incident to her sister after which she reported the matter to the police where she was referred to Nairobi Women Hospital where she was examined. After returning the results to the police, the police went to look for the appellant.

10. According to the complainant, the appellant did not use any protection and that was her first time to go to the appellant's house with whom she had no relationship. She insisted that the appellant forced himself on her and she did not consent to the act. It was her evidence that the real intentions of the appellant only became apparent to her when the appellant locked the door. She identified the P3 form, GVRC form, PRC form, Lab results, identity card and identified the appellant as the person who raped her.

11. In cross-examination the complainant disclosed that the appellant forced her to cook food after raping her. She denied that she was the appellant's wife and denied that her sister knew about their relationship and stated that her sister had never gone to the appellant's house. She stated that the appellant took away her phone and also took her sister's phone number. She denied that they had lived together for 2 months and denied that she called the appellant to go so that they solve their differences. She insisted that the appellant strangled her on the neck and insisted that she was raped by the appellant using his penis. She denied that she returned to the appellant's house and took the TV and gas cylinder. She denied that the case was a frame-up.

12. CNW, PW2, testified that on a Sunday in November, at around 10am, but whose date she could not recall, the appellant called the complainant and told her to go there for work. The complainant went there at around 2pm after returning from Kitengela. In the evening at around 8pm, PW2 called the complainant but the call was not answered. The following day, Monday at 5am, the complainant returned with torn clothes and bruised and narrated to her what had happened. According to her the complainant had difficulty eating and complained of neck pains and later went for treatment at Nairobi Women Hospital.

13. According to her, the complainant never informed her that she had been raped but that when she tried to leave, the appellant locked the door. However, the complainant told her that the appellant took her mobile phone and asked for her Mpesa PIN. Thereafter, PW2 received calls from the appellant suggesting that they should talk but she declined. It was her evidence that prior to the incident, she did not know the appellant and only saw him on the day he was arrested.

14. In cross examination, PW2 insisted that she did not know the appellant though she was aware he was charged with assault. She denied that the appellant and the complainant were married. She explained that when the complainant returned at 5am she did not disclose that she had been raped but informed her at 5pm. She insisted that she had never been to the appellant's house. She stated that she was unaware that the complainant took the appellant's TV and Gas and denied that the appellant was framed for demanding his said items. She denied that she demanded for Kshs 50,000/- to drop the case.

15. PW3, John Njuguna, a physician, appeared to produce the complainant's medical documents on behalf of one Irene Makau who prepared them but had gone back for further studies. According to him, upon examination, some spermatozoa was seen and some bruises were on both her upper and lower lips as well as on the right side of the neck. She also complained of abdominal pain and had bruises on the posterior prude of the vagina region (lower vagina). Based on the examination, the doctor concluded that the history and the examination were consistent with penal vaginal penetration. He exhibited the PRC Form and the P3 Form.

16. In cross-examination, he reiterated that upon the taking of high vaginal swab, spermatozoa were detected. He stated that there was an old tear of the hymen.

17. PW4, Cpl Emily Mbaire Mbugua, received the report of the incident from the complainant. She then sent the complainant to Nairobi Women Hospital where she was treated and returned the PRC and P3 forms. Upon perusal of the same, PW4 found evidence of penal penetration and bruises and visited the appellant's house in the company of the complainant. Later on October 9, 2020 she arrested the appellant, took his statement and preferred the charges against him. She exhibited the complainant's ID card.

18. Upon being placed on his defence, the appellant testified that on July 10, 2020 he met the complainant with whom they became acquainted and later became friends. In September, 202 they started living together as husband and wife but they disagreed on October 4, 2020 after the complainant found out that he was still seeing his ex-wife. The following day, upon his return from work, he found that the complainant had left taking with her gas cylinder, TV and her clothes. When he called her, she did not pick the call. He then called PW2 and they spoke. According to him, the complainant had introduced him to PW2 as her husband. On October 9, 2020, the complainant went to his house in the company of police officers and he was arrested and charged with rape. According to him, the complainant was his wife for 2 months. According to hi, both the police and the complainant demanded money from him in order to drop the charges.

19. In her judgement, the learned trial magistrate penetration was, based on the evidence on record, proved beyond reasonable doubt. As regards lack of consent it was her finding that the presence of bruises was evidence of lack of consent. She also found that the appellant was positively identified as the appellant admitted knowing the complainant. She found that the unsworn statement of the appellant left some gaps as he did not explain how the complainant got her injuries. She therefore fond the appellant guilty of rape.

20. In his submissions, the appellant contended that there were discrepancies with respect to the evidence of the complainant and that of PW4. While PW4 stated that the complainant had been to the appellant's house before the date of the alleged rape, the complainant's evidence was that the first time she entered the appellant's house was the day she was raped. According to the appellant the evidence of the complainant was wanting in integrity. he also took issued with the fact that the clothes which were allegedly torn were not exhibited. It was also submitted that the learned trial magistrate erred in not affording the accused an opportunity to submit before making a ruling that the appellant had a case to answer. In this case, it was submitted that instead of delivering a ruling on case to answer the trial instead proceeded to subject the appellant to defend himself. It was his submission that his defence that the case was informed by ulterior motive was never taken into account.

Determination

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

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

22. Similarly, in *Kiilu & another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus;

    1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

    2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

23. It has been held that in a first appeal the appellant is entitled to expect this court to subject the evidence on record as a whole to an exhaustive re-examination and the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on

a question of fact, the court has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the trial court with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See *Pandya v R* [1957] EA. 336 and *Coghlan v Cumberland* (3) [1898] 1 Ch 704.

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

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

25. In *Odongo and another v Bonge* Supreme Court Uganda civil appeal 10 of 1987 (UR), Odoki, JSC (as he then was) said:

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

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

> " A person commits the offence termed rape if-
>
> a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
>
> b. The other person does not consent to the penetration; or
>
> c. The consent is obtained by force or by means of threats or intimidation of any kind."

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

> " The word rape is derived from the latin term *rapio*, which mean 'to seize'. Thus rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will." In other words, rape is violation with violence of the private person of a woman. A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under the section 43 cited above. The sex must be against the will of the complainant. The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. The essence of rape is the absence of consent.

> Consent means an intelligent, positive concurrence of the 'will' of the woman. The policy behind the exemption from liability in the case of consent is based on the principle that a man or a woman is the best judge of his or her own interest, and if he or she decides to suffer a harm voluntarily, he or she cannot complain of it when it comes about. Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific sexual act...Consent may be either expressed or implied depending upon the nature and circumstances of the case. However, there is a difference between consent and submission. An act of helpless resignation in the face of inevitable compulsions is not consent in law."

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

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

29. The prosecution's case in summary was that some times in September, 2020, the appellant approached the complainant who was resting after a walk and proposed to her that he was aware of a job that was available and asked whether the complainant would be interested. After the complainant showed some interest, the appellant tried to lure her to his house but she declined. On October 4, 2020, the appellant got in touch with the complainant and informed her that the prospective employer was in his house. However, upon getting to the appellant's house, the said prospective employer was not there and she was informed by the appellant that he had just left. The complainant waited for the said employer to return till 7pm when she decided to return home. The appellant then locked her inside the house and proceeded to rape her and only allowed her to return home the following morning. The examination of the complainant's genitalia revealed that here was an act of penetration and that she also had fresh injuries.

30. The appellant on the other hand stated that he was in relationship with the complainant as wife and husband and that it was only after the complainant discovered that he was in communication with his ex-wife that the relationship became sour and in order to hit back at him the complainant and her sister, PW2, framed him up.

31. Before dealing with the merits of the appeal, the appellant has taken issue with the manner in which the proceedings were conducted by the trial court. According to him, he was not afforded an opportunity to adds the court at the close of the prosecution's case and that the trial court did not make a ruling whether a *prima facie* case had been made out before placing him on his defence.

32. I have considered the record of proceedings and I find no substance in this submissions. From the record, it is clear that the appellant asked for time to submit and was afforded the same. It is also clear that there is a long ruling on case to answer.

33. The appellant however submitted that there were contradictions in the evidence of the witnesses. According to him, when the complainant stated that he sister, PW2, was unaware that she was marred to the appellant, that contradicted the complainant's evidence the two were not married. The evidence on record however reveals that that answer was given to buttress the complainant's evidence that such relationship never existed. It was not given to show that there was a relationship which PW2 was unaware of.

34. As regards the other inconsistencies and contradictions, the Court of Appeal in *John Nyaga Njuki & others v Republic* Nakuru criminal appeal No 160 of 2000 [2002] 1 KLR 77; [2002] eKLR held that:

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

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

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

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

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

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

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

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

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

39. In *Joseph Maina Mwangi v Republic* CA No 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

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

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

41. In *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR it was held that:

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

eKLR)...In this appeal, we are satisfied that there were no discrepancies of the nature that would have created doubt and vitiated the prosecution case."

42. The same court in *David Rotich & another v R.* Nakuru Court of Appeal criminal appeal No 75 of 1999 held that:

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

43. As was stated in *John Cancio De SA v V N Amin* civil appeal No 27 of 1933 [1934] 1 EACA 13:

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

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

> "As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of

the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."

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

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

47. In this case, the evidence of the complainant was clear as to what transpired. The medical evidence showed that there was penetration. There was also evidence that the complainant sustained physical injuries thus corroborating the complainant's evidence of physical assault which negates the allegation that the act was consensual. That the complainant and the appellant knew each other was not in doubt as the appellant admitted this fact.

48. In this case there was overwhelming evidence that there was penetration which was not consensual and that the perpetrator was the appellant.

49. In the presence I find that the appellant was properly convicted and I dismiss the appeal as regards the conviction.

50. On sentence while I find no reason to interfere, from the record, though the appellant was admitted to bond, the record does not reveal that he was released on bond. Section 333(2) of the *Criminal Procedure Code* provides as hereunder:

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

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

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

51. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

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

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

53. The same court in *Bethwel Wilson Kibor v Republic* [2009] eKLR expressed itself as follows:

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

54. According to The Judiciary Sentencing Policy Guidelines:

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

55. In this case, there is no indication that the learned trial magistrate took into account the period that the appellant spent in custody before sentencing.

56. From the record the applicant was arrested on October 9, 2020 and though he was admitted to bail, he was in fact not released and was in custody the whole period up to and including the time of his sentencing. Therefore, while I find no reason to disturb the appellant's conviction and sentence, I however direct that his sentence will run from October 9, 2020.

57. It is so ordered.

G V ODUNGA

JUDGE

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF OCTOBER, 2022.

M W MUIGAI

JUDGE

Delivered the presence of: