NATHAN BROWNE BIRUNDI v REPUBLIC [2007] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 588 of 2001

(From original conviction and sentence in Criminal Case No.1000 of 2000 of the Chief Magistrate's Court at Nairobi – .R. A. Mutoka PM)

NATHAN BROWNE BIRUNDI …..…….…….…APPELLANT

VERSUS

REPUBLIC ……...……. RESPDONDENT

JUDGMENT

NATHAN BROWNE BIRUNDU, hereinafter referred to as ***"the Appellant***" was charged before the Chief Magistrate's Court, Nairobi with one count of Rape Contrary to Section 140 of the Penal Code. In the alternative the Appellant faced one count of Indecent Assault on a female contrary to Section 144 (1) of the Penal Code. The particulars of the rape charge were that the Appellant on the

"……10th January, 1998 at Nairobi, within the Nairobi area had carnal knowledge of YBO without her consent….".

The particulars of the Alternative count were that the Appellant

"***On the 10th January 1998 in Nairobi within the Nairobi area unlawfully and indecently assaulted YBO by touching her private parts".***

Following a full trial the Appellant was acquitted on the main count under Section 215 of the Criminal Procedure Code but convicted on the alternative count. Upon conviction the Appellant was sentenced to 4½ years imprisonment, 3 strokes of the cane plus hard labour.

Being aggrieved by the conviction and sentence, the Appellant through his Advocates Messrs Lubulellah & Associates lodged the instant Appeal to this Court. In his petition of Appeal, the Appellant faulted his conviction on 20 grounds but which can be reduced into five broad areas to wit:-

1. The defectiveness of the charge

2. The credit worthiness of Prosecution witnesses and lack of corroboration of the Complainant's testimony.

3. Failure to consider sufficiently the Appellant's Alibi defence and the shifting of the burden of proof to the Appellant.

4. Prosecution's failure to call certain material witnesses and non-drawing of the necessary inference by the Learned Magistrate.

5. The Prejudicial admission and reliance upon the Psychiatrist's report.

The facts of the Prosecution case as captured from the record are that ***YBO*** (PW1) and hereinafter referred to as the Complainant was a presenter of children's T.V. Programme with the Kenya Broadcasting Corporation. Her mother EAS (PW2) was then a secretary at the Attorney General's Office, where the Appellant worked as a State Counsel in the Department of Treaties and Agreements. She desired that her daughter, the Complainant, moves on to KTN to present a similar programme. She informed the Complainant of the intention and told her that she had already discussed the issue with the Appellant who doubled up as a part-time News Anchor with KTN. PW2 had infact already asked the Appellant to introduce the Complainant to the producer of the Children's Programme at KTN. This was in January 1998. The Appellant acceded to the request and offered to introduce the Complainant to J G (PW3) who was the producer at KTN of the Children's Programmes. However before he could do so he asked PW2 to let him see and talk to the Complainant first. The meeting was subsequently arranged for 9th January, 1998. On the said date, the Complainant was taken to the office of the Appellant by PW2. After talking to the Complainant for a while, the Appellant told the Complainant that he would introduce her to PW3. The Appellant then telephoned PW3 and inquired from him whether the Complainant could present on KTN the programme known as *"**Club Kiboko**"*. PW3 then talked to the Complainant and they all agreed to meet on the following day being Saturday 10th January 1998. The Appellant thereafter offered to drop the Complainant in town. On the way to town whilst in the Appellant's motor vehicle, a white Honda Civic, the Appellant remarked that the Complainant was attractive. Before dropping her along Tom Mboya Street, they agreed to meet again at Nyayo house the next day at 11 a. m. Where the KTN offices were located. The next day, the Complainant became apprehensive about meeting due to the Appellant's earlier remarks about her. Instead of meeting the Appellant at 11 a.m., the Complainant opted to go for the meeting at 3 p.m. hoping that the Appellant would have waited long enough and left. Surprisingly when she got to Nyayo house at 3 p.m., she bumped into the Appellant as he was driving out. He stopped and the Complainant got into the car. They drove straight to Hotel Intercontinental where the Appellant hoped to meet PW3. He left her in the car and came back after 20 minutes and told the Complainant that although he had not met PW3, he would however like her to meet someone else who worked at Stellavision Television Network who would help her present a programme known as *"**Teen Bash**"* at the said station. He informed her that the said person stayed at a local hotel. After driving for a while in town with

the Complainant they ended up at Forest Lodge Hotel. The two got out of the car and walked into the hotel. They walked straight into a room that was dark with curtains drawn.

The Complainant turned round to ask the Appellant about the room whereupon the Appellant just closed the door and without saying anything, slapped her about five times and then pushed her to the bed, ripped open her blouse, pulled down both her trousers and pants and warned her not to say anything. The Appellant then proceeded to rape her twice. Thereafter he forcefully inserted his pennies into her mouth. He then tried to perform oral sex on her but never succeeded as she fought him off.

When the Appellant was done, he warned the Complainant once more not to say anything to anyone regarding the incident and threatened her, severally, that he would make sure that her mother lost her job or he would kill her were she to reveal to anyone what had transpired. The Appellant and the Complainant then dressed and left. The Appellant forced her into the car and they drove off and later dropped her on Tom Mboya Street. She went home and found PW2 in the living room. PW2 asked her if she had seen the Appellant and she responded in the affirmative and proceeded to her room. Thereafter the Appellant continued to pester the Complainant through several telephone call inquiring whether she had talked about the incident to anybody. The Prosecution conceded that the Complainant never reported the rape ordeal to anyone and did not seek any form of medical attention immediately it happened.

Following the rape ordeal, the Complainant personality changed. This was noticed by David John Price PW5 a very close family friend. PW5 had become fond of the Complainant whom she found levelheaded and since she had no father, PW5 acted like her surrogate father. According to PW5 he called her from United Arab Emirates where he was working as an expert in Project Management on 15th January 1998. It is then that the Complainant told him how the Appellant was giving her problems. However, she never disclosed to PW5 that she had been subjected to sexual assault and harassment by the Appellant.

In April 1998 PW5 came to Nairobi and met the Complainant on 20th April, 1998 and although the Complainant was initially reluctant to talk about the incident, however after considerable persuasion by PW5, the Complainant opened up and spilled the beans. According to PW5, the Complainant became distraught during the revelations and at some point, even became hysterical. After completing her narration of the events to PW5, she pleaded with him not to tell her mother or else she (her mother) would call the police and the Appellant may carry out his threat to have PW2 sacked from the Attorney General's Chambers. When the PW2 returned home and found the two, the Complainant was so terrified and in order to avoid a situation where the PW2 mother would notice, PW5 took the Complainant out for dinner and calmed her down.

The next day, i.e. 21st April 1998 the Complainant telephoned PW5 at his hotel and informed him that the Appellant had called her again seeking repeat performance and had also threatened her. She wanted PW5 to advice her on what to do. PW5 advised her to report to the police. PW5 then informed PW2 what had happened to the Complainant. PW5 then contacted I.P. Prosper Bosire PW6 of Central Police Station who took a statement from PW1 and PW2 and also the Appellant. Actually the Appellant prepared his own statement which he then handed over to PW6. In the course of investigations the Appellant filed a complaint with the then

Commissioner of Police and Director of CID alleging that PW6 was harassing him. As a result of the complaint PW6 was relieved of his duties as the Investigator and was directed to hand over the file to IP Lydia PW8. On taking over the file PW8 directed PW2 to take the Complainant to a Psychiatrist by the name of Dr. Marks Manashe Okonji PW4 who, upon examining the Complainant, diagnosed her to be of depressive order and that the precipitant of the disorder was sexual assault that had taken place in January 1998. Subsequent thereto, the Appellant was on 17th April 2000 charged with the instant offences. This was roughly more than 2 years after the commission of the offence. It is also instructive that though the offences were alleged to have been committed on 10th January, 1998, it was not until April 1998 that the Complainant talked of the rape to PW5.

Put on his defence the Appellant elected to given an unsworn statement and called two witnesses. The Appellant's defence was two pronged. First that the charges were instigated against him by one Mr. Dan Ameyo, Chief State Counsel, in charge of the Department of Treaties and agreements and who was the Appellant's immediate supervisor. To the Appellant, Mr. Ameyo was acting out of jealousy in instigating the charges as he was labouring under the illusion that the Appellant was having sexual liaisons with his wife. The Appellant had known Ameyo's wife previously. Because of the seriousness of the allegations, the Appellant took it upon himself to dispel the same. Accordingly sometime in 1999 he went to Mr. Ameyo's office and together with Mrs. Ameyo, explained to him that they were mere friends. The genesis of the problem, he narrated, was a coincidental meeting between the Appellant and Mr. & Mrs. Ameyo in the parking lot of the Attorney General's office in 1995. That Mrs. Ameyo whom the Appellant had met while still a student at Nairobi University while she worked with KP & TC hugged him and in turn introduced the Appellant to Ameyo. However Ameyo already knew the Appellant. Ameyo was not satisfied with the fact that the two were mere friends and embarked on a deliberate scheme to frustrate the Appellant until it culminated in the charges. The Appellant cited various incidents and or events that occurred between 1995 and until he was charged involving him and Mr. Ameyo. Essentially they all add to one thing that after the encounter between Mr. & Mrs. Ameyo and the Appellant, the relationship between the Appellant and Mr. Ameyo was never the same again. He was never given any assignments by Mr. Ameyo and even those assignments given to him by other officers in the Attorney-General's Chambers would be countermanded by Mr. Ameyo. Further even trips outside the country to which the Appellant had been nominated to undertake would be interfered with by Mr. Ameyo. Mr. Ameyo even interfered with scholarships awarded to him. Despite all these frustrations somehow the Appellant always emerged tops. According to the Appellant when Mr. Ameyo was unable to fix him as aforesaid, sometimes at the end of 1997, Mr. Ameyo called him to his office. When he got there he found Ameyo with PW2.

PW2 was with another person whom she introduced to him as her daughter. This was the Complainant. PW2 then asked the Appellant if he could introduce her to KTN so that she could host children's programmes there. The Appellant acceded to the request and contacted PW3 and passed on the request. He then passed on the phone to PW2 who talked to PW3 as well as the Complainant. This was the first and last time he had an encounter with the Complainant.

The second limb of the Appellant's defence was an Alibi. It was his position that he would not have committed the offence alleged on the date stated, 10th January 1998 as he had traveled to Nakuru with his wife Florence, to attend to a family function. In support of the Alibi, the Appellant called his cousin, James Machuka Michoma, DW3

who confirmed that on 10th January 1998 he saw the Appellant and his wife in the Appellant's elder brother's house in Nakuru. This was at about 10.30 a.m. There was a circumcision ceremony involving the eldest son of Charles Birunda's, the elder brother of the Appellant, He remained with the Appellant and his wife at the function until 7 p.m. when he left.

In support of the Appeal, Mr. Kiage Learned Counsel for the Appellant submitted both orally and by way of skeleton arguments. With regard to the defectiveness of the charge sheet Mr. Kiage submitted that whereas the charge sheet stated that the Appellant indecently assaulted the Complainant ***"by touching her private parts"***, the conviction was on one part not borne out by any evidence, and on the other part on misdirection on the ingredients of the offence. The Learned trial Magistrate held that the Appellant indecently assaulted the Complainant by inserting his two fingers in the Complainant's vagina which finding was not backed by any evidence. Counsel further submitted that the finding by the Learned Magistrate that the Appellant further indecently assaulted the Complainant by touching the Complainant's vagina and anus with his penis was wrong in that the anus was not a private part. For this proposition, Counsel relied on the case of ***ISAAC OMAMBIA VS REPUBLIC (UNREPORTED) CRIMINAL APPEAL NO. 47 OF 1995*** Counsel further pointed out other discrepancies in the dates when the alleged offence was committed. That whereas the charge sheet talked of 10th January, 1998, the Complainant in her testimony alleged that the offence was committed on 10th January 2000.

With regard to creditworthiness and corroboration of the evidence tendered by the Prosecution, Counsel referred to the contradictions as to the dates of and surrounding the alleged offence, the post incident conduct of the Complainant, the appointment with PW3, when and where the Complainant confided to PW5, the layout of Forest lodge and the delay in reporting the incident. With regard to the date of the alleged offence, it was the Counsel's submission that the date and sequence of events were so jumbled up as to cast serious doubts as to whether the Prosecution case was not entirely made up. With regard to the conduct of the Complainant, Counsel submitted that it was the evidence of the Complainant that she went on with life as usual which in essence contradicted the evidence of PW5 that she had suicidal tendency.

As for the appointment with PW3, it was the contention of Counsel that PW3 categorically stated in his testimony that he gave the appointment for a meeting directly to the Complainant, contrary to the allegations by the Complainant, PW2 and PW5. Learned Counsel further pointed out the contradictions that emerged in the testimonies of the Complainant and PW5 with regard to when and where the Complainant confided about the incident to PW5. Was it on 21st January 2000 at PW2's house, on 21st April 1998 at the Hotel Ambassador or 15th January 1998 during a routine telephone discussion between the Complainant and PW5 while the latter was away in the United Arab Emirates. With regard to the layout of the Forest Lodge where the alleged offence was committed there was stark contradictions regarding the layout of the lodging in the evidence of the Complainant and members of staff of the lodging who were called to testify. Whereas the Complainant talked of a corridor leading to the room, PW7 a member of staff talked of no such corridor.

Learned Counsel then turned his guns on the delay in reporting the incident by the Complainant which in his view cast doubt as to the veracity of the Complainant's story. In support of this contention, Counsel illustrated various incidents which the Complainant admitted to have lied about. If the Complainant lied regarding certain

incidents, can her evidence regarding other incidents be believed? It was Counsel's contention that such evidence is unreliable and unsafe to found a conviction. For this proposition of the law, Counsel relied on the case of ***NDUNGU KIMANYI VS REPUBLIC (1979) KLR 282.***

With regard to corroboration of the evidence of the Complainant, it was the Appellant's contention that such corroboration was lacking. It was thought that the evidence of PW2, PW3, PW4 and PW5 would have provided the necessary corroboration. However according to Counsel, the evidence of these witnesses was far from providing the necessary corroboration, support, certainty and consistency to the Complainant's story. The evidence of PW5 upon which the Learned Magistrate "over" relied, according to Counsel, to found a conviction, had glaring and material discrepancies as to be untrustworthy. To reinforce this point, Counsel referred us to the case of ***PATRICK MWAI THUO VS REPUBLIC (UNEPORTED) CRIMINAL APPEAL NO.26 OF 1987*** Counsel further submitted that since the Prosecution case rested on the testimony of the Complainant only, the trial Court was clearly wrong to find a conviction on it in the face of the contradictions and admitted falsehoods. It is the same error Chief Justice Sir Udo Udoma reversed by setting aside the conviction in the case of ***ABAGI KIBAZO VS UGANDA (1965) EA 50.,*** Counsel submitted that in the absence of corroboration the Learned Magistrate should have found the offence not proved and acquitted the Appellant. The necessity for corroboration in sexual offences where the only evidence is that of the Complainant has been established by a long line of authorities. To drive home this point, Counsel cited to us the following authorities:

(a) KALIMBA VS UGANDA (1967) EA 363

(b) JOSEPH OPONDO ONAGO VS REPUBLIC (UR) CRIMINAL APPEAL NO. 91 OF 1999 (HC – K).

(c) RICHARD KIPTOO CHERUTICH VS REPUBLIC (UNREPORTED) CRIMINAL APPEAL NO. 71 OF 2000.

When the Court drew the attention of Counsel to the latest decision of the Court of Appeal which expressed the view that decisions which hold that corroboration was essential in sexual offence before a conviction are no longer good law as they conflict with Section 82 of the Constitution (See ***JOHN MWACHIGADI MUKUNGU VS REPUBLIC (UNREPORTED) CRIMINAL APPEAL NO. 227 OF 2002*** Counsel responded that the Learned Judges of Appeal were being gratuitous in their sentiments and their holding, as an ordinary bench of the Court of Appeal, cannot unsettle the decisions of great longevity that have been applied consistently. It was Counsels submission therefore that corroboration was still a requirement and since there was none in this case, it was unsafe to convict the Appellant.

Counsel then dealt with the Alibi defence raised by the Appellant. It was counsel's view that the Learned Magistrate's treatment of the Alibi defence left a lot to be desired and was prejudicial to the Appellant. Counsel submitted that in the process of rejecting the Appellant's Alibi defence, the Court shifted the burden of proof to the Appellant by requiring him to proof that he was in Nakuru on the date and time of the offence by producing photographic, fuel receipts etc contrary to a long line of authorities like ***WANGOMBE VS REPUBLIC (1980) KLR 149, STEPHEN YEBEI KURGAT VS REPUBLIC (UNREPORTED) CRIMINAL APPEAL NO. 1995 OF***

1996, MOHAMED ELIBITE HIBUNYA & ANOTHER VS REPUBLIC (UNREPORTED) CRIMINAL APPEAL NO. 22 OF 1996 and ***REGINA VS TURNBULL (1977) 1QB 224.***

On failure to call certain witnesses, Counsel submitted that the DCIO, Central Police Station, one Githui Mithano, who had recommended that the file be closed after initial investigation should have been called. Certain other witnesses sought by the defence were not called as well. In those circumstances, Counsel submitted, an adverse inference ought to have been drawn. In support of this submission counsel referred us to the case of ***BUKENYA & OTHER VS (UGANDA (1972) EA 549.***

Counsel finally faulted the admission in evidence of the Psychiatric report prepared by PW.4. Counsel submitted that in the absence of medical evidence to sustain the charge of indecent assault, the Court admitted and acted on a report by PW4 whose evidential value was nil. PW4 was a Psychiatrist and he examined the Complainant nine months after the event. To Counsel, the Learned Magistrate should have disregarded the report. Counsel concluded his submission by stating that the conviction of the Appellant was signally unwarranted in the circumstances and urged us to allow the Appeal, quash the conviction and set aside the sentence.

Mr. Kaigai, Learned Stated Counsel appeared for the State and opposed the Appeal. Counsel submitted that it was the word of the Complainant against the Appellant. On credibility of the Complainant, Counsel submitted that though the Complainant conceded to have lied on certain aspects of the matter, she adequately and sufficiently explained why she found it necessary to do so. Further, Counsel pointed out that in any event the lies touched on peripheral issues and not those central to the charge. Counsel further submitted that the Complainant was a young girl who had been indecently assaulted and traumatized. The fact that she explained to PW2 and PW5 lent credence to her evidence and established her credibility as a witness of truth. It was Counsel's further submission that the Learned trial Magistrate who examined her demeanour in Court found her reliable. That the Complainant withstood most searching cross examination by the Appellant's Counsel.

On corroboration, Counsel submitted that the Learned trial Magistrate warned herself of the danger of convicting on uncorroborated evidence. Counsel admitted that what PW2, PW4 and PW5 said did not amount to corroboration. However Counsel maintained that their evidence enhanced the credibility of the Complainant. Counsel further submitted that it is trite law that a Court can convict on uncorroborated evidence of a single witness. For this submission Counsel referred us to Section 143 of the Evidence Act. On the failure to call certain witnesses, it was the view of Counsel that there is no set requirement of the number of witnesses required to prove a fact. Regarding PW4's report, Counsel submitted that the trial Magistrate did not exclusively rely on the said report but addressed the entire evidence as a whole. On Alibi, Counsel submitted that the Learned Magistrate did not at all shift the burden but rightfully dismissed it as it had been displaced by the Prosecution case. Finally on the defectiveness of the charge, Counsel submitted that there was none and that even if there was curative effect of Section 382 of the Criminal Procedure Code could come into play especially because the Appellant all along was represented by Counsel. On the basis of the foregoing, Counsel urged us to dismiss the Appeal.

In a brief reply, Mr. Kiage submitted that section 382 of the Criminal Procedure Code does not assist the Respondent. The evidence did not match the charge. As for the lies by the Complainant, Counsel submitted that it was not enough for the state to

say that the lies were explained. There were internal and external inconsistencies in the Complainant's evidence which cannot be explained away on grounds of trauma. Yes the Learned Magistrate warned herself of the dangers of convicting the Appellant, however to Counsel this was not a panacea and did not preclude the Magistrate from looking for tangible evidence. On Alibi defence, Counsel reiterated that the Magistrate shifted the burden when she asked for evidence and commented on lack of it.

It is now well settled, that a trial Court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as a analysed. This is a duty no Court should run away from or play down. In the same vein, the first Appellate Court has a duty imposed on it by law, to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first Appellate Court would give allowance for the same. There is now a myriad of case law on this point but the well known case of ***OKENO VS REPUBLIC (1972) EA 32*** will suffice. We shall bear the foregoing in mind as we consider this Appeal. It would appear from the record that the conviction of the Appellant was predicated upon the credibility attached to the evidence of the Complainant, PW2 and PW5. For this reason it is necessary for us to deal first with the question of whether these witnesses and in particular the Complainant was a credible witness. The Complainant did admit in cross examination that she lied in certain aspects of her evidence. The Learned State Counsel did concede as much in his submissions but hastened to add that the lies were sufficiently explained and that in any event the lies did not go to the root of the Prosecution case. Given the defence advanced by the Appellant we do not think that the lies were explainable or that they did not go to the root of the Prosecution case. We think that the inconsistencies and contradictions in the testimony of the Complainant were material. Some of the glaring inconsistencies involved the date when the alleged offence was committed. According to the Complainant she visited her mother, PW2 at her place of work who then introduced her to the Appellant on 8th January, 1998 and they were to meet Jimmy Gathu, PW3 on 10th January, 1998. However the version given by PW2 is different. According to her she called PW1:-

"……during February, 1998 – it was a Friday – Birundu went with her to Nyayo House…."

The question that arises is when was the offence committed? According to the charge, the offence was committed on 19th January 1998. However if the evidence of PW1 was to be believed, it happened a day after the first meeting with the Appellant. That would be on 9th January 1998. Indeed even PW2's testimony seems to support this position. She testified that she did not see her daughter clearly on that day that is 9th January, 1998. Again according to the Complainant after her first encounter with the Appellant and as the Appellant dropped her in town, he remarked that she was attractive. She was uncomfortable with the remark and decided not to honour the intended meeting with the Appellant, at 11 a.m. The comment by the Appellant was allegedly made on 9th January, 1998. However, from the evidence, the first meeting between the Appellant and the Complainant was on 8th January 1998. So when was the offence committed? Was it on 9th or 10th? Was it on Friday or Saturday? Was it in January or February 1998. Because of these contradictions serious doubts are raised as regards the credibility of the evidence of

the Complainant. Time and dates of the commission of the offence were of essence. We do not think in the circumstances that Section 382 of the Criminal Code can come to the aid of the Prosecution case.

Further contradictions and or inconsistencies in the testimony of Complainant can be found in the post-incident conduct of the Complainant. According to the Complainant, after the incident, the Appellant dropped her in town and she made her way home. At home she found PW2 who asked her whether she had been with the Appellant and she denied. She further told PW2 that she was no longer interested in the job.

However according to PW2, that evening when she came back and she asked her whether she had met the Appellant, she responded in the positive but hastened to add that they had been unable to meet the producer. Yet according to Mr. Price, PW5 after the incident and as the Appellant drove her to town.

"……..They were stuck in a jam and she opened the door and ran away blindly and in panic and she ran into a shop thinking he would follow her……"

PW1 also stated that after the incident she ***"went on with her life as usual……"*** She continued going to the Nairobi Pentecostal Church where she belonged to the Youth Group. The only difference the mother noticed was that she was watching T.V. a lot at night yet PW5 alleged that she lost interest in everything and even concluded that she had suicidal tendencies.

Mr. Price was a key witness in this case and indeed the Learned Magistrate did place a lot of premium on his evidence. However there is a nagging problem with his testimony regarding where and when the Complainant confided with him regarding the ordeal. PW1 testified that on 21st January, 2000 her mother's friend, Mr. Price was in the house and since she could not hold it anymore, she broke down and told him about the incident. However PW5 testified that on 21st April 1998 at lunch time he was at the Hotel Ambassador and the Complainant called him to say that the Appellant had called her at home and she then told him about the incident. Where exactly was Mr. Price? At home or at the hotel? What is more than this breaking down and telling Mr. Price about the incident, had been said earlier on by Mr. Price to have occurred on 15th January 1998, when he allegedly telephoned the Complainant from United Arab Emirates.

If we were to agree that the incident occurred on 10th January, 1998, it was not until April 1998 that the Complainant considered with it to PW5. Why did the Complainant not report the incident immediately.

There is evidence that there were two girls at the Forest Lodge reception to whom she could have reported the incident. After all she was left in the room alone according to her testimony, for about 5 minutes, as the Appellant waited for her in his car in the car park. From the lodging she proceeded home and talked to her mother but again never talked about the incident. If anything and according to the mother, she proceeded to her room and thereafter had a shower. Come Sunday and she went to church as usual and met the Youth Pastor. Again she never confided with the Pastor as to what had happened to her. The Complainant stated that the incident happened during school holidays. When the schools re-opened, she went back to school and again she could not confide the incident to her teachers or any one of them or fellow students. Finally, the Complainant could have reported the incident to the police, She did not. According to the Complainant, she hesitated to

report the incident to any of the aforesaid people because the Appellant had threatened to have her mother sacked from her employment in the Attorney General's-Chambers. We find this explanation unconvincing.

In our view if indeed that was the case, how come then that eventually she told PW5? Her mother was still working at the Attorney General's Chambers as at that time! Did her fears regarding her mother's job all of a sudden dissipate? The Complainant did admit in her evidence that she gave a false statement to the Police. Under cross examination by Appellant's Counsel during the trial, she was categorical that part of what was contained in the statement was untrue. She further conceded that she lied to the Appellant for failing to turn up at the agreed time. In the case of ***NDUNGU KIMANYI VS REPUBLIC (SUPRA),*** the court held:-

"…… The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence……."

On our own evaluation of the Complainant's evidence and that of PW2 and PW5 evidence we are persuaded that the Complainant was less than candid in her evidence.

How about the evidence of PW5? His testimony was so detailed as to leave one wondering whether it was not from a rehearsed script. The testimony was so detailed as compared to the complainant's evidence as to make the trial Magistrate observe

"……. The details about the sexual assault and harassment the accused purportedly subjected the Complainant to as warranted (sic) by Price were never mentioned by the Complainant……..".

As correctly observed by Mr. Kiage, this was a significant departure which should have placed the Learned Magistrate on guard and so call for a more circumspective treatment of the conflicts, inconsistencies and contradictions in the Complainant's testimony. Having raised her suspicion regarding Price's testimony, nonetheless, the Learned Magistrate proceeded to hold that

"…….Mr. Price's account may have been more detailed than that of the Complainant but in material aspects of it, there is consistency which I find confirms the truthfulness of the Complainant's assault ……"

We doubt whether in the light of the contradictions in Price's testimony that we are about to demonstrate, the trial court should have held that he was consistent. For instance, Mr. Price testified that after the alleged event:-

"……..two of her teeth were loose her face was slightly swollen and inside her mouth was lacerated. She also had teeth marks on her nipples for two days. She fell on her back on the head once slapped….".

The Complainant in her testimony said nothing of that sort. Further, PW5 would not have testified as to the injuries as he never saw the Complainant immediately after the incident. Mr. Price further claimed that after the incident the duo were stuck in a traffic jam and the Complainant seized opportunity and

"……opened the door and ran away blindly into a shop……."

Yet the Complainant testified that the Appellant dropped her along Tom Mboya from where she proceeded home and met the mother. The mother did not notice any untoward conduct on the Complainant. It is also in the evidence of Mr. Price that in the course of the incident the appellant proclaimed to the Complainant regarding the impending sexual adventure with the words:-

"……And now for grand event……".

The Complainant in her testimony as well as under cross examination never mentioned such a thing. Mr. Price also testified that the appellant had made numerous sexual suggestion to the complainant including asking her if she had a boyfriend and the fact that younger women found sex fulfilling with older men. The complainant never made any reference to such discussion. Mr. Price also talked of the Appellant having:-

"….fondled the Complainant's breast…"

A thing the Complainant does not mention at all. Price also claimed that the Appellant on one occasion drove the Complainant into a closed down petrol station where he indecently assaulted her by force and had attempted to get her to agree to have sexual intercourse. The Complainant did not testify to such a thing. We would agree with the Learned Counsel for the Appellant that in the light of these glaring and material discrepancies, the Learned Magistrate erred in seeing Price's testimony as a conformation lending consistency to the Complainant's version when the reality was that they are so different and so inconsistent as to be unrecognizable.

In this regard it is worthy repeating the words of the Court of Appeal in the Case of ***PATRICK MWAI THUO VS REPUBLIC (UR) CRIMINAL APPEAL NO. 26 OF 1987*** to the effect:-

"…….It must be emphasized that the complainant's evidence should be trustworthy as the foundation of the Prosecution case. If the alleged corroboration does not bear out the Complainant, but emphasize something that the Complainant does not rely on, the so called corroboration may detract from the complainant's story……..."

In our overall assessment of Mr. Price's evidence, we entertain doubts whether the evidence lent any support, certainty or even consistency to the Complainant's story. We think that it so detracted from the Complainant's story as to completely destroy it.

No doubt, the Learned Magistrate was alive to the need to seek corroboration in sexual offences and indeed she did warn herself of the dangers of convicting the Appellant in the absence of corroboration. She however sought to find corroboration in the evidence of the Complainant's mother and PW3, JG. With tremendous respect to the Learned Magistrate the evidence of the Complainant's mother cannot provide any corroboration to the evidence of the Complainant. All that the mother said was that on Saturday she gave permission for the Complainant to go to town to meet the Appellant. When she came back in the evening she never told the mother about the ordeal she had undergone under the hands of the Appellant. She was not distraught at all. If anything she even lied to the mother that she had not met the Appellant and proceeded to her bedroom and thereafter had a shower. To the mother the Complainant was just behaving normally. This is not the kind of evidence that a court of law would say was corroborative of the Complainant's evidence. As for PW3, he never met the Complainant either before or after the incident. All that there is that PW3 had wanted to meet the appellant. However the meeting was never to

be. So where is the corroboration. It is also interesting to note that earlier on, the Learned Magistrate had found as fact that the Complainant's evidence was not corroborated at all. We do not understand how then the Learned Magistrate turned around and said that the Complainant's evidence:-

"….In certain material respects corroborated by the evidence of her mother and Mr. G……"

There having admittedly been no corroboration of the complainant's evidence and though the learned magistrate bore in mind the holding in ***CHILA & ANOTHER VS REPUBLIC (SUPRA)***, the conviction of the appellant would appear to have been unsafe in the circumstances. The necessity for corroboration in sexual offences where the only evidence is that of the complainant has been restated in several authorities See ***KATIMBA VS UGANDA, JOSEPH OPONDO OWAYO VS REPUBLIC (SUPRA)*** and ***RICHARD KIPTOO CHERUTICH UR (ALL SUPRA).*** What these authorities are all agreed upon is that in sexual cases corroboration is necessary as a matter of practice to support the testimony of the Complainant. The need for corroboration in sexual offences appears to be based on the holding in the case of ***MAINA VS REPUBLIC (1970) EA 370*** to this effect:-

"……Before leaving the matter of the first two counts we would state in the hope it will be of use to the Magistrate on future occasions, as pointed out by the Court of Appeal in HENRY AND MANNING VS. REPUBLIC 53 CRIMINAL APPEAL NO. 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the Magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case……."

Whereas we do not agree with the general proposition that women or for that matter are habitual liars as there is no scientific proof for such statement we would however hasten to add that the law on corroboration as tat the time of the Appellant's conviction was as stated above. However since then situation has been ameliorated. The Court of Appeal in the case of ***JOHN MWASHIGADI MUKUNGU VS REPUBLIC, CRIMINAL APPEAL NO. 227 OF 2002*** have since held that:-

"……Decisions which hold that corroboration is essential in sexual offences before conviction are no longer good law as they conflict with Section 82 of the Constitution?

This decision was delivered at Mombasa on 30th January, 2003. Yet the Appellant was convicted on 9th April 2001. This means therefore that the holding in MUKUNGU CASE would be inapplicable. The Applicable law then was the pre MUKUNGU CASE. Corroboration was therefore necessary. Although the Learned Magistrate duly cautioned herself of the dangers of convicting the Appellant, nonetheless he proceeded to do so. Given the

contradictory nature of the Complaint's evidence as well that of PW5 and the dual defences advanced by the Appellant we would hold that the conviction of the Appellant was unsafe……"

With regard to the defects in the charge, we note that the Appellant is said to have indecently assaulted the Complainant by touching her private parts. According to the Learned Magistrate, the offence was proved as there was evidence that the Appellant inserted his two fingers in the private parts of the Complainant and also that he touched the Complainant's vagina and anus with his penis. With regard to the first aspect, the Complainant never alluded to such thing in her testimony. This is how she delivered herself:-

"……After he closed the door he slapped me on my face about five slaps. He then pushed me into the bed and he ripped open my blouse. He then pulled down my trousers that I had on and then he warned me not to make any sound or anything. He then took off his trousers and then raped me. After the first time he rested for a while and then did again. He then put himself inside my mouth and then he raped me through my anus as I fought him off but he never succeeded. He then warned me that if I said anything he would make sure that my mother lost her job because he was a lawyer and my mother was just a secretary and he would kill me if I told anyone. He then left the room. I got dressed and got out…."

It is clear that nowhere in the Complainant's testimony or indeed in any other testimony was it alleged that the Appellant inserted his fingers in the Complainant's vagina. The closest we come by such evidence is by PW5 who claimed that the Complainant had told him thus:-

"…..He then took off her trousers while he slapped her and told her to be quite. He then took off her trousers and her pants at once and indecently assaulted her by forcing her legs apart and inserted atleast one finger into her vagina very roughly and persistently……"

We have already made our observation regarding the credibility of this witness. The Complainant does not at all talk about the insertion of a finger in her vagina if at all it was true would the Complainant have forgotten such an important aspect of indecent assault in her testimony more so if it was accompanied by excruciating pain as PW5 described? We do not think so. We also note that although the trial Magistrate found as a fact that two fingers were inserted in the Complainant's vagina, Mr. Price talks of only one finger. We do not think that the evidence of PW5 is believable.

The other aspect of indecent assault was the alleged Appellant's touching the Complainant's vagina and anus with his penis. To touch something, one must employ his or her hand. One cannot touch something with a penis. Touching connotes by hand. Further it cannot be said that an anus is a private part as it is not part of human genitalia. In the case of ***ISAAC OMAMBIA VS REPUBLIC (supra)*** the Court of Appeal dealing with a similar issue stated:-

"…..These particulars that the Appellant touched the private parts of the Complainant mean and can mean nothing else, than that the Appellant touched with his hand the *"private parts"* ***of the Complainant which, to give the well known and ordinary meaning of that phrase, means the genitalia of the Complainant and to no other part of her body, or as defined in the shorter Oxford English dictionary, the*** *"Pupenda"* ***or "external genital organs…..".***

On the basis of the foregoing, it would appear that the offence of indecent assault was not proved if the Appellant touched the Complainant's vagina with his penis. Further if he touched her anus by whatever means, the offence was not committed as anus is not part of privates parts of a woman.

We now turn to the Appellant's defences. The Appellant's first line of defence was that the case was instigated by one, Dan Ameyo, who was his boss at the Attorney General's Chambers. Having suspected that the Appellant was having an affair with his wife, he swore to fix him. From the Learned Magistrate's Judgment we note that she took considerable time in trying to discount and discredit this to line of defence by the Appellant. However from the correspondence exhibited by the Appellant during the trial there is no doubt at all that there was no love lost between the Appellant and the said Mr. Ameyo. The genesis of their disagreement is not discernable from the correspondence. Consequently it may well be possible as claimed by the Appellant that he was set up in the case by Dan Ameyo because of his suspicion then that he was having sexual liaisons with his wife. We do not think that it was right for the Learned Magistrate to go out of her way to discredit this theory. The Prosecution made no attempt whatsoever to counter this line of defence. What could have been easier that to have the said Mr. Dan Ameyo testify! What was required of the Appellant was to raise a plausible defence and the Prosecution to counter it. We think that the Appellant's defence was plausible in the circumstances.

The Appellant similarly raised the defence of Alibi. It was to the effect that on the material day he was away in Nakuru attending a family function at his brother's house in Nakuru. The Appellant was accompanied by his wife, F. This defence was raised very early and the Police had all the time to investigate it. Indeed PW6, Inspector Prosper Bosire confirmed having been given the defence on or about the 16th May, 2000. This was soon after the Appellant had been charged. Pursuant to the defence, PW6 talked to the Appellant's wife, who confirmed that the Appellant and her were away in Nakuru on the material day. In a bid to buttress his Alibi defence, the Appellant called DW3 – James Michoma, who confirmed having seen the Appellant as well as his wife at the ceremony. He was with them at ceremony between 10.30 a. m. and 7 p. m. He confirmed that between these hours the Appellant never left the house. In the case of ***WANG'OMBE VS REPUBLIC (SUPRA)*** it was held that:-

"…..When an accused raises an alibi as answer to charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the Prosecution. Even if the Alibi is raised for the first time in an unsworn statement as this trial, the Prosecution (Police) ought to test the alibi wherever possible, but different consideration may then arise as regards checking and testing it and it is sufficient for the trial Court to weigh the Alibi against the evidence of the Prosecution….."

How did the Learned Magistrate deal with the issue? It does appear to us that the Learned Magistrate expected the Appellant to prove his Alibi. She required of the Appellant to demonstrate his presence in Nakuru by production of photographs taken during the alleged ceremony and fuel receipts. In so demanding the trial Court was clearly shifting the burden of establishing the veracity of the Alibi to the Appellant. This is not the task of the Appellant at all. See also ***STEPHEN YEBEE KURGAT VS REPUBLIC (UNREPORTED) CRIMINAL APPEAL NO. 95 OF 1996*** and ***MOHAMMED ELIBITE HIBUYA & ANOR VS REPUBLIC (UNREPORTED)***

CRIMINAL APPEAL NO. 22 OF 1996 (CA–K). The Learned Magistrate fell again in error by suggesting that the Appellant ought to have called his wife rather than his cousin as a witness to back up is claim. Indeed in dismissing DW3's evidence, the Learned Magistrate referred to him as ***"a cousin, second removed".*** Suggesting thereby.

Suggesting thereby that the Appellant should have called a closer relative while at the same time suggesting and implying that a close family members would lie to support an alibi without evidence. The Learned Magistrate quite erroneously claimed that the Alibi offered is the:-

"…..The sort that it is impossible to confirm…."

It is the trial Court that was saying this without any suggestion or evidence from the Police that they doubted the Alibi or had any difficult confirming it. It is on record that PW6 did talk to the Appellant's wife over the Alibi. We note that after investigation, it had been recommended by the DCIO, Central, one Mr. Githinji Mithano that the file be closed. Could the Alibi defence been part of the reason. The file was however subsequently reopened and the Appellant charged even though PW6 was not aware of any fresh evidence. As correctly pointed out by Counsel of the Appellant, this was a vital witness who ought to have been called. Given the Appellant's defences particularly that of the Police being pressurised into charging the Appellant by one Dan Ameyo, it was necessary for this witness to be called although there was nothing to stop the defence from calling him as a defence witness.

In the end then and for all the reasons given we would allow this Appeal, quash the conviction and set aside the sentence. We order that the Appellant shall forthwith be set free unless otherwise lawfully held.

Dated at Nairobi this 8th day of February, 2007.

……

LESIIT

JUDGE

……..

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Mr. Kaigai for State

Mr. Kiage for Appellant

Erick/Tabitha Court Clerks

……

LESIIT

JUDGE

……..

MAKHANDIA

JUDGE