**Kirui v Republic (Criminal Appeal E030 of 2021)**
**[2023] KEHC 18311 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18311 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BOMET**

**CRIMINAL APPEAL E030 OF 2021**

**RL KORIR, J**

**MAY 30, 2023**

**BETWEEN**

**BERNARD CHERUIYOT KIRUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal against the Judgment of Hon. P. Achieng and sentence of Hon. L. Kiniale in Criminal Case No. 1302 of 2016, delivered on 2nd September 2021 at the Principal Magistrate's Court at Bomet)***

## JUDGMENT

1. The Appellant was charged and convicted of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code Cap 63 Laws of Kenya and of a second count of the offence of rape contrary to section 3 (1) (a) (c) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the first charge were that on the 2nd day of January 2016 within Bomet County robbed ECM of Kshs. 500/= and a mobile phone make Itel valued at Kshs. 1,500/= and immediately before the time of such robbery caused grievous harm to the said ECM.

3. The particulars of the second count were that on the 2nd day of January 2016 at [Particulars withheld] village within Bomet County intentionally and unlawfully caused his penis to penetrate the vagina of ECM without her consent.

4. The Appellant was arraigned in court on 19th January 2016 to take plea and he denied the charges. A plea of not guilty was subsequently entered for both counts. The case proceeded to full trial with the Prosecution calling 5 witnesses. At the close of the Prosecution's case, the Appellant was placed on his defence and section 211 (1) of the Criminal Procedure Code was explained to him. He elected to give unsworn testimony and stated that he had no witnesses. However, during the defence case, the Appellant decided to call his brother-in-law as his witness.

5. At the end of the trial the Appellant was convicted on both counts of robbery with violence and rape. The trial court sentenced him to death for the first count of robbery with violence and held the second sentence in abeyance owing to the nature of the first sentence.

6. Being dissatisfied with the decision of the trial court, the Appellant filed Grounds of Appeal on 23rd September 2021 in which he raised 4 grounds as follows: -

    1. That the learned trial Magistrate erred in law and fact in convicting him on evidence which did not meet the required standard.

    2. That the learned trial Magistrate erred in law and in fact by relying on extrinsic evidence that was not adduced during the trial.

    3. That the learned trial Magistrate erred in law and fact by depending on evidence which was based on conspiracy theory between him, the Appellant, and the witnesses PW1 and PW2, which was not proved beyond reasonable doubt by the Prosecution witnesses.

    4. That he wished to be present during the hearing of the appeal and requested for the court proceedings to enable him to launch more grounds of appeal.

7. On 17th October 2022, Learned Counsel Mr. Kadet came on record on behalf of the Appellant and sought leave to amend the Petition of Appeal. The Supplementary Grounds of Appeal are dated 28th November 2022 and filed on the same date. Counsel raised 9 grounds as follows: -

    1. That the learned trial magistrate relied on witness evidence whose credibility could not hold water.

    2. That the learned trial magistrate erred in law and in fact by convicting the Appellant despite the Prosecution not proving their case to the required standard.

    3. That the learned trial magistrate erred in law and in fact by not properly evaluating the evidence adduced by the Prosecution and thus arriving at an erroneous conclusion.

    4. That the learned trial magistrate erred in law and in fact by relying on contradictory evidence meted with inconsistencies, insufficiencies and irregularities to secure a conviction for the Prosecution.

    5. That the learned trial magistrate erred in law and in fact by convicting the Appellant when the Prosecution had not proved all the elements required for the conviction of rape and robbery with violence.

    6. That the learned trial magistrate erred in law and in fact by failing to consider the defence of alibi that was sound and cogent.

    7. That the learned trial magistrate erred in law and in fact by failing to assign an advocate to the accused person knowing too well that substantial injustice would result.

    8. That the learned trial magistrate erred in law and in fact by relying on evidence of recognition, yet the evidence adduced by the Prosecution was of identification.

    9. That the learned trial magistrate erred in law and in fact by denying the Accused a right to fair trial and proceeded with the case despite the fact that he informed the court that he was sick and not ready to proceed with the hearing.

8. On 17th October, 2022 this Court directed that the parties canvass the Appeal by way of written submissions.

**The Appellant's Submissions**

9. The Appellant's submissions were filed on 28th November 2022 by his counsel Mr. Kadet Kiprono. Counsel raised five issues for determination by the Court being: whether the charges of rape and robbery with violence were proved beyond reasonable doubt to warrant the conviction of the Appellant; whether the evidence of identification was applicable instead of evidence of recognition; whether the failure to call key witnesses was fatal to the Prosecution case; whether failure to assign an advocate to the Accused led to substantial injustice; and whether the failure of the court to allow an adjournment on the account of the accused's sickness led to substantial injustice.

10. On the first issue, Counsel submitted that it was the Prosecution's responsibility to discharge the burden of proof in a criminal trial and relied on the case of Miller vs. Minister of Pensions (1947) 2 All ER 372 cited in Ngida Kiloriti Meiseiki vs. Republic. He submitted that the ingredients of rape were outlined in the case of Nicholas Kiprotich Rono vs. Republic (2022) eKLR and that in the present case, there was no evidence adduced in respect of proving the ingredient of penetration, save for the allegations of the victim.

11. Counsel further submitted that PW2, the clinical officer gave contradictory evidence when he testified that the age of injuries was 25 days yet the P3 Form recorded that the injuries had occurred 5 days prior to the examination. It was also his submission that the P3 Form (P. Exh6) did not indicate that the victim had been penetrated to prove rape. That the Court should disregard the victim's testimony that she was raped since her testimony had glaring inconsistencies. That according to Section 124(3), she ought not to be believed.

12. On the second issue, Counsel submitted that the victim stated that the Appellant was known to her as her neighbour and later stated that she only knew him by facial appearance which raised questions as to whether she knew what she was talking about. Therefore, even though the trial court could rely on the single evidence of one witness, in the present case, the identification of the perpetrators was in question and raised doubts. Counsel further submitted that no evidence was adduced to show that the victim gave a description of her attacker. To this end, he relied on the case of R. vs. Turnbull & Others (1976) 3 All ER, 549, Francis Kariuki Njiru & 7 Others vs. Republic (2001) eKLR and Njoroge Mwangi vs. Republic (2021) eKLR.

13. On the issue of failure to call key witnesses, Counsel submitted that failure by the Prosecution to call Leonard who was mentioned severally to shed light on the circumstances of the case was fatal to their case. He cited the case of Bukenya & Others vs. Uganda (1972) E.A. 549.

14. On the fourth issue, Counsel submitted that Articles 50 (g) and (h) of *the Constitution* required that an accused person be informed of their right to an advocate and afforded one at the State's expense. That failure by the trial court to assign an advocate infringed on the Appellant's constitutional rights. He cited the case of Stephen Berenge Mwera & Another vs. Republic (2020) eKLR.

15. Lastly, Counsel submitted that the Appellant's right to a fair hearing was infringed because he requested the trial court on several occasions to adjourn the case owing to ill health. Thus, he urged the Court to quash the conviction on both counts and set the sentence aside.

**The Respondent's/Prosecution's Submissions**

16. The Prosecution's submissions are dated 17th October 2022 and filed on the same date. Mr. Njeru Learned Prosecution Counsel submitted on the first charge of robbery with violence that the Appellant who was in the company of Charles met with the victim, strangled her and hit her with an improvised rungu on the head and left hand before raping her and making away with Kshs. 500/= and the victim's mobile phone. That the evidence on Record proved the offence of aggravated robbery in that, theft and violence were proved.

17. On the Appellant's identity, the Prosecution submitted that the Appellant was known to the victim, and she was able to identify him immediately when she was rescued which was what led to his arrest. Further, that she had no reason to frame the Appellant because they had no previous grudges.

18. On the second count of rape, the Prosecution submitted that the evidence on Record proved penetration based on the victim's sole testimony which was then corroborated by the medical evidence. They submitted that the circumstances of the offence were such that the victim could not have given consent considering that she was under a vicious attack. Thus, sexual intercourse was coerced.

19. Lastly, the Prosecution submitted that the Appellant's identity was conclusive. They urged the Court to dismiss the Appeal as it was unmerited and amounted to mere denials which could not dislodge the Prosecution's case.

20. The duty of a first appellate court was succinctly stated by the Court of Appeal in Kiilu & Another vs. Republic [2005]1 KLR 174, as follows:-

> " 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."

21. It cannot be gainsaid also that in a criminal trial, the burden of proof rests on the Prosecution. The Court of Appeal in John Mutua Munyoki vs. Republic [2017] eKLR restated this principle and further explained the standard of proof thus: -

> " ...In all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged."

[See also Federal Court of United States' decision in the case of United States vs. Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001)].

**Issues for Determination**

22. Having read the trial Record, the grounds of appeal and the supplementary grounds of appeal together with the rival submissions of the parties, I isolate the following issues for my determination:-

    i. Whether the Prosecution proved the charge of robbery with violence to the required legal standard.

    ii. Whether the Prosecution proved the charge of rape to the required legal standard.

    iii. Whether failure to afford the Appellant legal representation was fatal to the Prosecution's case.

iv. Whether the sentence was legal and merited.

v. Whether the Prosecution proved the charge of robbery with violence to the required standard.

23. The offence of robbery with violence is premised on sections 295 and 296 (2) of the Penal Code as follows: -

295. Definition of Robbery

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual

violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

24. In Mugambi vs. Rep (1980) KLR 75, Law, Miller and Potter, JJA., outlined the ingredients of the offence as follows: -

> " The offence of Robbery is constituted by two elements, stealing and the use of violence at or immediately before or immediately after the time of stealing."

25. These ingredients were also vividly espoused by the Court of Appeal in Olouch vs. Republic (1985) KLR where the Court of Appeal stated as follows: -

> " ...Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

26. It was the evidence of PW1 E 'M (the victim) that she met the Appellant on the material date at about 7.15 a.m. who then accosted her by holding her neck and strangling her with the jumper that she was wearing. PW1 vividly described her ordeal during the said incident. She testified that the Appellant threatened to kill her because he did not manage to kill the person he wanted to kill and so he held her on the neck using her shirt after she managed to remove the jumper she was wearing. She further testified that she managed to remove herself from the hold of the Appellant by also removing the shirt and at that point, the Appellant held her scarf and strangled her with it.

27. It was the victim's testimony that during the incident, the Appellant hit her on the head using a bolt-headed nut and then hit her on her left hand and finally on her right leg which became swollen. She

testified that she became dizzy and as she tried to get away, the Appellant hit her on her right leg once again.

28. The Prosecution adduced the evidence of PW5 Inspector Naomi, the Investigating Officer who produced the victim's blouse/shirt (P. Exh2), her scarf (P. Exh3), the torn T-shirt (P. Exh. 4), torn biker (P. Exh. 5a) and a blue pant (P. Exh 5b).

29. PW2 Julie Magut, a Clinical Officer at Longisa County Hospital testified on behalf of Yegon who had examined the victim but was deceased by the time of the trial. She testified that the victim was presented with her left leg bandaged and walking on crutches. On examination also, PW2 testified that the victim had healed scars on her right temporal region of the head, tenderness on the left upper arm and near shoulder region with a fracture of the shaft of the tibia. The degree of injury was classified as grievous. PW2 produced the P3 Form (P. Exh 6) which I have also re-examined and noted the injuries as recorded.

30. PW1's testimony was corroborated by that of PW3 Charles Kiplang'at Koech who testified that he found her seated on the ground, crying with an injury on her leg.

31. It is evident that the victim was attacked by a person who was armed with a dangerous weapon, in this case, the bolt-headed nut as per her testimony, which was used to inflict injuries on her head, arm and leg.

32. The victim also testified that her assailant took money from her jumper in the sum of Kshs. 500/= and her mobile phone make Itel. PW5 produced a purchase receipt dated 2nd December 2016 (P. Exh1) in respect of the said mobile phone confirming the victim's ownership. It was PW5's testimony that the mobile phone and money were never recovered.

33. The key issue is whether the Appellant was clearly identified and linked to the offence. From the Prosecution witnesses presented before the trial court, only PW1 the victim pointed to the Appellant as the one responsible for attacking, robbing and raping her. She testified that she recognized the Appellant in the company of Charles and Cheruiyot as all three were her neighbours. She therefore recognized him. This Court is however dutybound to critically examine such evidence and satisfy itself that the evidence of identification was free from any error.

34. In R vs. Turnbull and others (1979) 3 All ER 549, the court cautioned as follows: -

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

35. Similarly, in Hassan Abdallah Mohammed vs. Republic [2017] eKLR, it was stated thus: -

> " Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga vs. Republic (1989) KLR 424 at 426 had this to say:
>
> > "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

36. It is therefore imperative that I re-examine the circumstances of the case and particularly, the time of the victim's attack, in order to arrive at a finding of whether or not the victim could positively identify her assailant, in this case the Appellant.

37. It was PW1's testimony that she was on her way to the market that morning at around 7.15 a.m. She testified that she met the Appellant and two other men and immediately she saw them, she recognized them as her neighbours. While two of the men bypassed her, the Appellant remained behind and attacked her.

38. From this testimony, it is evident that the incident took place early in the morning when there was sufficient natural light to make it easy for one to clearly see other people who may have been walking with them on the same road. It is the view of this Court that it is much easier to pick out someone that is familiar under such circumstances. I am satisfied that the lighting conditions based on the time of day and the victim's prior knowledge of the Appellant were sufficient to enable her to see clearly and recognize the Appellant.

39. Secondly, I have considered the vivid description by the victim of her ordeal and how the Appellant attacked and raped her. She described the manner in which she tried to release herself severally and escape from the hold of the Appellant in vain and how the Appellant kept repeating that he must kill someone because he couldn't kill the one, he wanted to kill. At every attempt to escape, the victim testified that the Appellant would grab hold of her clothes and would strangle her using them. She testified that at one instance, the Appellant hit her on the head and hands. It is clear from her evidence that the ordeal lasted long enough to enable her to clearly see her assailant. Indeed, when she was eventually found by the roadside and rescued, she immediately called out the Appellant by name and identified him as the one who had attacked her.

40. Having analyzed PW1's evidence, this Court finds that the victim's sole evidence of recognition was free from any possibility of error. The Appellant was well known to her, the ordeal lasted long enough for her to set her eyes on him and the lighting conditions favoured a positive identification. I am fortified by the reasoning of the Court of Appeal when faced with similar circumstances in Stephen Karanja vs. Republic (2011) eKLR where the court held: -

> " The evidence of the complainant was that the robbery took place at about 8.00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition."

41. From the evidence above, it is clear that the victim clearly identified the Appellant as the person who was in the company of two others. The two others left and the Appellant attacked the victim causing her serious injury which Dr. Yegon who examined her described in the P3 Form (P Exh. 6) as maim. In the P3 Form "main" means the destruction or permanent disabling of any external or internal organ, member or sense. From those injuries and the testimony of the Victim that the Appellant kept saying that "he must kill someone", this court is of the view that the Appellant ought to have been charged with the offence of attempted murder.

42. With respect to the mobile phone and money which the Appellant is alleged to have forcefully taken from the victim, I find the evidence rather insufficient. The Investigating officer produced a receipt (P. Exh 1) which proved purchase of the phone. The said phone was not tracked or recovered. The evidence as it were creates a very strong suspicion that the Appellant did rob the victim of her phone and money. It does not prove beyond reasonable doubt that she had a phone and money which were stolen from her by the Appellant. I therefore find the conviction on the charge of robbery with violence to be unsafe. I grant the Appellant the benefit of doubt on this charge. He is therefore acquitted of this charge on ground of insufficient evidence.

**ii. Whether the Prosecution proved the charge of rape to the required standard.**

43. The second count against the Appellant was the charge of rape contrary to section 3 of the *Sexual Offences Act*. The said section of the law provides thus: -

> 3. Rape
>
> 1. A person commits the offence termed rape if-
>
> a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
>
> b. the other person does not consent to the penetration; or
>
> c. the consent is obtained by force or by means of threats or intimidation of any kind.
>
> 2. In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.
>
> 3. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

44. In order to prove a charge of rape, the Prosecution must prove the ingredients set out in the above section of the law. These ingredients outlined above constitute the actus reus which is penile or other form of penetration by the accused into the victim's vagina while the mens rea connotes the accused's intention to have unlawful and coerced sexual intercourse with the victim. It follows then that in order to prove a charge of rape, the Prosecution must establish the following ingredients: -

i. That there was Penetration;

ii. That no consent was obtained by the accused in committing the act of penetration; or

iii. That if there was consent, the same was obtained forcefully or by use of threats.

**a. Penetration**

45. Section 2 of the *Sexual Offences Act* defines penetration as: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

46. It follows therefore that penetration may be partial or complete and the degree of penetration does not matter. In Erick Onyango Ondeng vs. Republic (2014) eKLR, the Court of Appeal in explaining this ingredient of penetration stated thus: -

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

47. In the present case, the Prosecution adduced the evidence of the victim to prove the element of penetration. She testified that during the struggle to get away from the Appellant, the Appellant hit her on the right leg prompting her to sit down at which point he pulled down her black biker and pant before raping her. She testified that her innerwears - biker (P. Exh. 5a) and a blue pant - were torn during the ordeal.

48. The complainant's evidence was corroborated by the medical evidence adduced by PW2 Julius Magut, the Clinical Officer from Longisa County Hospital. PW2 testified that the victim was examined 25 days after the incident and found to have bruises on her labia minora and labia majora, with her hymen broken. It was their conclusion that the bruises were indicative of forced vaginal penetration. He produced the P3 Form (P. Exh 6) to this effect.

49. Evidently, the victim was penetrated by the person who attacked her. Her evidence and that of PW2 demonstrate clearly that she was sexually assaulted and the fact that the medical examination indicated that there were bruises on her genitals occasioned by trauma demonstrated that she was truthful when she stated that the Appellant, after physically assaulting her, proceeded to assault her sexually. The first ingredient of penetration therefore stands adequately proven.

**b. Lack of Consent**

50. The second element in a charge of rape is lack of consent. Black's Law Dictionary, 10th Edn. at page 368 defines consent as: -

> "A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, especially given voluntarily by a competent person."

51. In a charge of rape, the Prosecution must adduce evidence to prove either that an accused person did not grant their consent to the sexual intercourse, or if they did, the same was obtained by use of coercion, threats or intimidation. The Court of Appeal in Republic vs. Oyier (1985) eKLR held thus: -

> "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."
>
> 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."

52. In this case, it was the Prosecution's evidence through the testimony of the victim PW1 that the Appellant first attacked her and then raped her. She testified that he first hit her on the head with the bolt-headed nut then on her left hand and finally on her right leg. She also stated that she began to bleed and at some point, became dizzy to the point of almost losing consciousness. It was her further testimony that when she fell down and tried to get up in order to get away from the Appellant, she could not do so because he pulled her down and by that time, her right leg was also already badly injured.

53. The medical evidence adduced in this case indicated that the victim had indeed sustained grievous injuries as she was noted to have healed scars on her head while her arm and shoulder region were still tender and painful. It was also the Clinical Officer's observation that the victim was walking on crutches since she had sustained a fracture on the shaft of her tibia. She was admitted at Tenwek hospital for a number of days.

54. From the above evidence, it is clear that in attacking the victim, either the Appellant decided to escalate the assault to rape or it was his original intention to sexually assault the victim and he determined to do this by first incapacitating her and making her immobile by hitting her with the rungu on her head, arm and legs. Regardless of what his original intentions were, the evidence before the trial court demonstrated that he viciously attacked and then raped the victim, and therefore under such

circumstances, there could be no consideration that consent was obtained or that it existed at all. The Appellant had formed the necessary mens rea to attack and rape the victim and did so systematically after grievously injuring her and rendering her incapable of walking.

55. From the totality of the evidence on Record, it is clear that the victim was sexually assaulted and that the circumstances of her ordeal could not in any way imply that she had consented to the forceful sexual intercourse. I find that the second element of lack of consent was adequately proven to the required legal standard.

56. In his defence, the Appellant stated that he was away in Sotik at his brother-in-law's (Charles Kirui - DW2) house on the material day and worked for him constructing a pit latrine for most of the day. That on the evening of 1st January 2015, he had supper with the said Charles and then he woke up the following morning to continue with the work. He testified that he returned home on 3rd January 2015 at 10.00 a.m. when he was arrested by the chief and administration police officers. It was his testimony that he was with his brother-in-law during the incident and therefore, could not have been responsible for the crime. He called DW2 Charles Kirui who corroborated his evidence.

57. The Appellant therefore raised the defence of alibi. Having raised this defence, it was incumbent on the Prosecution to disprove the alibi defence and adduce evidence which would incriminate the Appellant and prove the charges. Indeed, the Supreme Court pronounced itself on this issue in the case of Victor Mwendwa Mulinge vs. R. [2014] eKLR thus: -

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."

58. It follows then that even at the point of the defence case, the Prosecution is still vested with this burden of proof. That burden never shifts to an accused person. In R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, the Court of Appeal for Eastern Africa stated thus: -

> " The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

59. The defence of alibi must however be pleaded at the earliest to enable the Prosecution to look into its truthfulness and consider whether to charge and proceed to prosecute an accused person. In R. vs. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

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

60. Similarly, in Festo Androa ASenua vs. Uganda, Cr. App. No. 1 of 1998 the court stated the following: -

> " We should point out that in our experience in Criminal proceedings in this country, it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the

time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

See also the South Africa case of S vs. Malefo en Andere 1998 (1) SACR 127 (W) at 158 (a-e) and the Court of Appeal decision in Erick Otieno Meda vs. Republic [2019] eKLR).

61. I have considered the alibi defence and noted that it was only raised during the defence case. The Appellant had initially elected to give unsworn testimony and to call no witnesses. However, he later opted to call his brother-in-law as his witness. Evidently, the defence of alibi was raised too late to enable the Prosecution to investigate it. It is also the view of this Court that the fact that he raised this defence only during the defence hearing made it an afterthought and denied the Prosecution a chance to investigate it.

62. I must however test the Appellant's alibi defence against the entire Prosecution evidence already analyzed. I find that it was not cogent enough to displace or weaken the Prosecution's case. In arriving at this finding, I am guided by the decision in S vs. Sithole 1999 (1) SACR 585 (W) at 590 [g– i] where it was stated: -

> " There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken." (Emphasis mine)

63. Having settled the above, it is my firm conclusion that the defence case was an afterthought and that the Prosecution's evidence against the Appellant on the charge of rape was watertight. It is my firm finding that the Prosecution, in this case, proved the charge of rape beyond reasonable doubt and in the premise, I uphold conviction on Count 2.

**iii. Whether failure to afford the Appellant legal representation was fatal to the Prosecution's case.**

64. I now consider the arguments of the defence Counsel in respect of the Appellant's right to legal representation. The legal framework on legal representation is premised on several Statutes and International legal instruments. *The Constitution* of Kenya, Article 50 provides thus: -

50

(2) Every accused person has the right to a fair trial, which includes the right-

g. to choose, and be represented by an advocate, and to be informed of this right promptly.

h. to have an advocate assigned to the accused person by the state and at State expense, if substantial injustice would otherwise result and to be informed of this right promptly....

65. The Constitutional edict above is given Statutory expression in The *Legal Aid Act* No. 6 of 2016 which provides for the right of an Accused person to legal representation as follows: -

43.

(1) A court before which an unrepresented accused person is presented shall-

(a) promptly inform the accused of his or her right to legal representation;

66. Kenya is also a party to the International Convention on Civil and Political Rights (ICCPR), 1966. With respect to the rights of an Accused person, it provides at Article 14 (3) as follows: -

c. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

67. The African Charter on Human and Peoples Rights at Article 7 (1) (c) also states thus: -

> " Every individual shall have the right to have his case heard. This comprises...the right to defence, including the right to be defended by counsel of his choice..."

68. This right stems from an appreciation that not all accused persons may have the ability or knowledge to defend themselves in a court of law. Indeed, His Lordship, Lord Denning in Pett v. Greyhound Racing Association, (1968) 2 All E.R 545, captured this aptly at page 549 thus: -

> " It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

69. Thus, the right to legal representation is fundamental to an Accused and determines whether or not a trial is fair. In the case of Karisa Chengo & 2 Others vs. R. (Criminal Appeal Nos. 44, 45 & 76 of 2014) [2015] eKLR the Court of Appeal at Malindi observed as follows: -

> " It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the State obligation to provide legal representation arise.

70. Similarly, the Report on African Commission in Avocats Sans Frontières (on behalf of Bwampanye) vs. Burundi, African Commission on Human Rights, Comm. No. 213/99 (2000) observed:-

> "...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case....the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to 'argue their cases ...on an equal footing.'"

71. It follows then that a court of law should give adequate consideration to this fundamental right owing to an accused and should bear in mind the overarching principle of upholding the ends of justice.

72. The right to be granted legal representation at state expense is however not absolute and may be subjected to specific limitations. In the case of S vs. Halgryn 2002, (2) Sacr 211 (SCA), it was stated that:-

> "Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations."

73. The Court of Appeal in Karisa Chengo (supra) held as follows in this regard: -

> This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise. (emphasis added).

74. Counsel argued in his submissions that the Court should be persuaded to find that the proceedings, the judgment and sentence of the trial court were a nullity on grounds that the Appellant's rights under Article 50 (g) were violated. More particularly Counsel argued that because the Appellant had been charged with a capital offence, the trial court ought to have informed him of his rights and afforded him legal representation at the State's expense.

75. I have considered the proceedings in the trial court in their entirety and noted that the Appellant understood the nature of the charges he faced from the onset and throughout the trial, had a fair opportunity to cross-examine witnesses which he ably did. The Appellant was then given an opportunity to defend himself and called a witness in support of his case. The Appellant also made an oral application for a review of bond terms which the trial court allowed.

76. It is my finding then, that there was no substantial injustice occasioned to the Appellant owing to his lack of legal representation. The Appellant actively participated in the trial and was not inhibited in any manner during the conduct of his case. Further, I note on this appeal that the Appellant has instructed

Counsel. This implies that he had capability to instruct Counsel in the trial in the lower court. I find that the obligation of the State to provide the Appellant Counsel did not arise in this case as he had the capability of instructing one then.

77. Further, this court has already set aside the finding on the capital offence of robbery with violence. This means that arguments on automatic legal representation on account of having been charged with a capital offence no longer hold.

**iv. Whether the sentence was legal and merited.**

78. The Appellant was sentenced to death for the first count of robbery with violence while the sentence for the second count of rape was kept in abeyance. I have already acquitted the Appellant on the charge of robbery with violence. I shall therefore not belabour the issue of sentence on that charge.

79. Sentencing is an important aspect of the criminal justice system. It is axiomatic that sentencing is a reserve of the trial court. S. vs. Nchunu & Another (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court stated: -

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be."
>
> (See also the Court of Appeal decision in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR).

80. In passing a sentence, a court exercised its discretion but must be guided by judicially sound principles. These principles are stated in the Judiciary Sentencing Policy Guidelines (2016) and at paragraph 4.1 on page 15 as: - Retribution; Deterrence; Rehabilitation; Restorative Justice; Community protection; Denunciation.

81. In S vs. Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35, the purposes of a sentence were set out thus:-

> " Plainly, any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. .....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society."

82. I am therefore conscious that sentencing must seek to achieve any or all of the above objectives. Any sentence imposed must also be commensurate to the gravity of the offence that an accused person has been convicted of. In R vs. Scott (2005) NS WCCA 152, Howie J. Grove and Barn JJ stated: -

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..... one of the purposes of punishment is to ensure that an offender is adequately punished.... a further purpose of punishment is to denounce the conduct of the offender."

83. At the same time, the court must put into consideration mitigating and aggravating circumstances in every case. It is not merely enough to pass a sentence as prescribed by the law without applying one's mind to the circumstances of the case.

84. The Sentencing Guidelines at para 23.4 provide thus: -

> To determine the most suitable sentence, the court shall take into account the aggravating and mitigating circumstances.

85. Mitigating factors that ought to be considered by the court were aptly stated in the case of Gedion Kenga Maita vs. Republic, Criminal Appeal No. 35 of 1997 (UR), as follows: -

> " ...We are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was committed, the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature."

86. I have considered the circumstances of this case and the manner in which the Appellant attacked and physically assaulted and maimed the victim. I have considered how the victim described her ordeal and the nature of her injuries from the P3 Form. She sustained a fracture on her leg and had to be admitted in hospital. The victim suffered great physical harm and psychological trauma. She was also stripped her of her dignity.

87. The trial court left the sentence in Count II in abeyance. As I have already acquitted the Appellant on Count 1, I set aside the sentence in Count 1 and proceed to impose the sentence on Count II. I have already described above how aggravated the offence was. It bears repeating that the Appellant first maimed his victim then proceeded to rip apart her clothes and rape her. He stripped her of her dignity and left her for dead. The sentence for rape under Section3(1) of the SOA is not less than 10 years imprisonment which may be enhanced to life. The Appellant in this case deserves an enhanced sentence.

88. In the end, I quash the conviction on the charge of robbery with violence and set aside the sentence thereon. On Count II, I uphold the conviction. The Appellant is sentenced to serve 20 years imprisonment for the offence of rape. The sentence shall run from the date of conviction in the lower court.

The Appellant has 14 days' right of appeal to the Court of Appeal.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF MAY, 2023**

**.....**

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of the Appellant virtually present at Naivasha Prison, Mr. Waweru holding brief for Mr. Njeru for the Republic, Mr. Kadet for the Appellant and Siele (Court Assistant)