



REPUBLIC OF KENYA



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**Kuria v Republic (Criminal Appeal 1 of 2021)  
[2022] KEHC 11059 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11059 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL 1 OF 2021  
CM KARIUKI, J  
JULY 28, 2022**

**BETWEEN**

**DAVID KIMANI KURIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the decision of the Honourable Principal Magistrate Ocharo Momanyi in Criminal Case No. 1797 of 2016 delivered on 18th January 2021 and subsequent sentencing on 26th January 2021 by Chief Magistrate Judith Wanjala at Nyahururu.)*

**JUDGMENT**

1. The Appellant herein together with another was charged with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code CAP 63 and one count of rape contrary to Section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006 with an alternative charge of committing an indecent act with an adult contrary to Section 11 (a) of the *Sexual Offences Act*.
2. The particulars of the aforementioned charges were as follows:-

**Count 1**

Robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars are that on the 29<sup>th</sup> day of July 2016 at Subukia Sub County, Nakuru County, the Appellant jointly with others not before court while armed with a dangerous weapon namely firearms robbed ANW of cash Kshs 45,000/-, an Alcatel touch screen mobile phone valued at Kshs 10,000/, Techno Y3S mobile phone valued at Kshs 7,500/- and a Nokia Mobile phone valued at Kshs 1,900/- all valued at Kshs 64,400/- and immediately after such robbery used actual violence to the said ANW.



### **Count 2**

Robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars are that on the 29<sup>th</sup> day of July 2016 at Subukia Sub County, Nakuru County, the Appellant jointly with others not before court while armed with a dangerous weapon namely firearms robbed DWK of a Nokia Mobile phone valued at Kshs 5,500/ and immediately before the time of such robbery threatened to shoot the said DWK.

### **Count 3**

Robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars are that on the 29<sup>th</sup> day of July 2016 at Subukia Sub County, Nakuru County, the Appellant jointly with others not before court while armed with a dangerous weapon namely firearms robbed SKK of unknown amount of money and a Nokia Mobile phone valued at Kshs 7,500/- and immediately before the time of such robbery fatally shot the said SKK.

### **Count 4**

Rape contrary to Section 3(1) (a) (b) (3) of the [Sexual Offences Act](#) No 3 of 2006.

The particulars are that on the 29<sup>th</sup> day of July 2016 at Subukia Sub County, Nakuru County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of ANW without her consent.

## **15. Alternative charge to Count 4**

3. Committing an indecent act with an adult contrary to Section 11(a) of the [Sexual Offences Act](#) No 3 of 2006.
4. The particulars are that on the 29<sup>th</sup> day of July 2016 at Subukia Sub County, Nakuru County, the Appellant intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of ANW.
5. The Appellant was convicted as charged on all counts save for the alternative charge and sentenced to suffer death. Being dissatisfied with the said conviction and sentence of the Appellant filed the appeal herein raising grounds of appeal summarized as follows: -
  - i. That the learned trial magistrate erred in law and fact in finding as he did that the prosecution had discharged the burden of proof saddled upon it by law and went ahead to convict the Appellant under Section 215 of the Criminal Procedure Code for the various offences levelled against him in view of a fundamental misapprehension of the facts as well as the law.
  - ii. The learned trial magistrate erred in law and fact in failing to apply his mind to the testimony tendered by the prosecution and defence witnesses as well as the submissions on record which would inevitably have led to a different conclusion.
  - iii. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the investigating officer PW14 testified that after conducting a thorough and scrupulous investigation, he could not conclude that the Appellant was involved in the crimes he was accused. The investigation officer gave evidence clearing the Appellant from blame and went ahead to testify that were it not for the positive identification by PW1 during the identification parade, the Appellant would likely not have been arraigned to court. The trial



court is therefore entirely responsible for gravely curtailing the Appellant's right to freedom of movement, liberty and fair administrative process.

iv. That the learned trial magistrate erred in law and fact in dealing with matters before him arbitrarily, casually and on whims rather than on analysis of evidence and the law. The trial court ignored the submissions filed by the defence and the judgement was improper and unprocedural for failing to comply with the dictates of the law.

v. That the learned chief magistrate handed down an illegal sentence in view of the fact that death sentence is no longer legal in our jurisdiction.

vi. That the conviction and sentence is dangerous, shambolic and against the weight of the evidence tendered by the defence and the law ought to be overturned in earnest.

## 19. Background to the Appeal

6. In her evidence PW1 narrated the incident that happened at their homestead on the night of 29<sup>th</sup> July 2016. The witness stated that on the material day they had closed their shop at around 8 PM and went home which is a walking distance. She was with her two sons N (5 years old) and D (PW2 17 years old). That she was sitting in the sitting room with PW2 when she heard her husband switch off his motor bike outside the house and thereafter heard him try to open the grill door into the house. She said that usually they did not lock the gate and house door while waiting for her husband, the deceased herein who run a business at Solai.
7. PW1 testified that suddenly three men entered into the house. The three men had tried to restrain her husband from entering into the house. The house lights were on. He and PW2 ran into one bedroom as the three men followed her husband into another bedroom. One of the three men had a long gun whereas another had a short gun. One of the assailants was tall and wore a long black /greyish jacket and a white tee shirt. His face had things like pimples. He was the one with the long gun. The one with a short gun wore a jumper and had a bald head. The third one wore a marron jacket but did not have a gun. All of them had not covered their faces.
8. The witness stated that the tall one pulled the husband into the kitchen and heard them saying that they were going to kill him. Thereafter she heard a gunshot.
9. PW1 testified that the three assailants came into the bedroom that they were in and demanded for money. She told them she had Kshs 15,000/- but they responded that it was not enough because they had been paid Kshs 100,000/- by business colleagues to eliminate them and that if they were to be spared then they would have to pay more than what they had been given. She told the assailants that she had money in the phones for Equitel (22,363/-) and M-pesa (Kshs 30,000/-). She had already given them the Kshs 15,000/-.
10. The witness said that the one with the shot gun was the 2<sup>nd</sup> Accused and the one with the long gun was the 1<sup>st</sup> Accused (the Appellant herein). She stated that the 1<sup>st</sup> Accused told her that she doesn't have a husband because they had killed him. PW1 then went to look for the phones to do the money transfer. She went into the kitchen and found her husband on the floor.
11. It was her testimony that the 2<sup>nd</sup> Accused took 5 phones from his pocket and asked which one belonged to her. The phones belonged to her, her husband, her son and for the money transfer business.
12. She further narrated that the 2<sup>nd</sup> Accused held her by the hand and told her that they should leave together. As they left the house she saw another person outside. He was inside the compound next to the gate. About 5 security lights were on. This would be the fourth assailant. PW2 was still on the floor in the house. The young child, N was under the bed. They assailants took her into a nearby maize field.



- The 2<sup>nd</sup> Accused was still holding her hand whereas another one was holding her neck from the back. It was about 9.30 PM. The witness said the assailants had been in the house for about 40 minutes.
13. She stated that they reached a second farm and that is where they instructed her to transfer the money that was in her phones to some number. The assailants had called someone who gave them the number that the money was transferred into. She transferred Kshs 30,000/- to that number which indicated that it was registered in the names of one Frank Bett. She asked them to get an account number for a further transfer. The assailants called someone again but they were not given the account number and that is when they took away her phone with the "PIN" number. The 1<sup>st</sup> Accused then instructed the other assailants to move away. He asked PW1 to remove her clothes but she resisted prompting the 1<sup>st</sup> Accused to ask for the small gun. He was abusing her and saying he will kill her. He told her to kneel down and she complied and he then raped her. After the rape, he told her that she was dirty and then told the other assailants to kill her. The 2<sup>nd</sup> Accused then pulled her from the ground.
  14. PW1 testified that the short one among the assailants used the mobile torch and pointed it to his colleagues asking PW1 whether he would identify any of them to which she responded in the negative. The same person using the mobile torch is the one who had the Kshs 15,000/- that she had given out earlier on in the house. The witness says the assailants started arguing about that Kshs 15,000/- because the person who had it said it was only Kshs 8,000/-. Thereafter they said it was getting late and they needed to go and hijack a motor cycle to get away with.
  15. The 2<sup>nd</sup> Accused then told her to crawl into the maize plantation and disappear. She slept for about 40 minutes and then crawled to the main road where she met a boda rider who took her home. On the way she met neighbours and police officers and she was informed that her husband had been rushed to hospital. She was also taken to hospital where she was treated and discharged. The next day she was informed that her husband had died as a result of the gunshot. She then reported the incident to the police.
  16. After about three days she was informed that three people had been arrested and she went to participate in the identification parade. She identified the 1<sup>st</sup> Accused in the parade from the marks on his face and based on the fact that the assailants had no masks and the house lights were on. She also identified him as the person who raped her.
  17. Later on, she was called to the police station and participate in another identification parade where she identified the 2<sup>nd</sup> Accused. He was the one who had the five phones as mentioned earlier on in her testimony. He is also the one who held her by the hand as they took her from the house into the maize field. The lights were on and therefore she would identify him. She clarified that the source of the light was electricity.
  18. On cross examination, she stated that she did not give the police the description of the attackers but she had done a statement to that effect.
  19. She reiterated that it was the 1<sup>st</sup> Accused who said he will shoot her husband and then shortly thereafter she heard a gunshot. That it appeared from the incident that the 1<sup>st</sup> Accused was the gang leader. That at the identification parade, she got out of the car and went to the parade and touched him after identifying him. She further stated that the he is the one who raped her by inserting his penis into her vagina.
  20. She asserted that there was electricity and thus she would easily identify the assailants who had not covered their faces. That the thugs also used the mobile torch on their faces and she saw them.
  21. PW2 is PW1's son. They were together in their house when the thugs attacked them.



22. PW2 confirmed that their gate was not locked because they usually wait for his father who does business in Solai whereas they stay at Kabaazi. That electric lights were on in their house when they were attacked. He also heard a motor bike park outside their house and knew that his father who had arrived. Suddenly there was commotion at the entrance door to the house. PW2 stated that his mother (PW1) wailed. His father was already in the sitting room and there were some people in the sitting room as well. PW1 pulled him and his young brother into the parents' bedroom. As they hid in the bedroom, he had a bang from the kitchen which he assumed was a gun shot.
23. PW2 stated that two people entered into the bedroom and demanded for money which PW1 took from the cupboard and gave the thugs. The electric bulbs were still on. They demanded for more money saying that what they had been given was not enough. PW1 then said she would get more from the phones which had been misplaced in the confusion. He tried to get up to go look for the phones but was ordered to lie down by one of the thugs who had a long coat and wore muddy sports shoes. That the person who had a face with spots with a fair complexion and was bald headed was Accused one. The other person was the one who was given money by PW1. PW2 said that he saw two people but he would hear another one murmuring in the kitchen.
24. He narrated that the thugs were moving around searching for the phones and thereafter the thugs went out of the house with PW1. He rose up and went to the kitchen and saw his father lying down bleeding. He tried to raise his father up but he said he could not rise up or stand. He opened the kitchen door, jumped over the fence to a neighbour's (PW3) compound to ask for assistance and also went to another neighbor's compound to request for a car to take his father to hospital. That neighbor (Baba M) never responded though PW2 knocked on his gate.
25. He went on to state that he met another neighbor (Njomo) heading home and he accompanied him into their house. They carried his father into a vehicle. As they were putting him into the vehicle, Baba M came driving his minivan and in it were uniformed officers who ordered everybody to lie down. PW3's uncle was also in the minivan. He stated that after identifying who they were, the officers allowed them to take the injured to hospital. The deceased died as he was being wheeled to the wards. He was with Njomo the neighbor, Samuel and his uncle.
26. PW2 stated that they went back home and passed at [Particulars Withheld] where his mother had been hospitalized. PW1 was crying and not speaking at the hospital where she was on a drip. She had been sexually assaulted.
27. He asserted that the incident happened very fast and took about 20 minutes. The assailants took all the phones that were in the house. Later, he participated in the identification parade of the 2<sup>nd</sup> Accused. He stated that he knew the 2<sup>nd</sup> Accused because he had withdrawn some money from their Mpesa shop. He also identified him because of his height, his bald head and the fact that during the incident he was unmasked.
28. PW2 further testified that he could identify the Accused persons. He stated that Accused one was the one in the house with a gun and he had also seen him at Kabaazi and he had also withdrawn money in their Mpesa shop.
29. Upon cross examination, the witness denied that he had first seen the 1<sup>st</sup> Accused in court. He further stated that it is normal for them to leave their gate unlocked as they wait for their father to come back home. The intruders entered the house at about 8.30PM and the electricity lights were on.
30. The witness stated that he heard two-gun shots in the house. Further, that when they came back from hospital they found about 7 to 8 people in their house. He was informed by PW1 that the assailants had



- informed her that the incident was about business rivalry but he didn't know of any business rivalry between his parents and anybody else.
31. On re-examination, he reiterated that he had stood up from the floor where he had sat to go assist her mother get the phones as requested by the assailants and that is when he saw the assailants.
  32. PW3 is the complainant's immediate neighbour. He testified that on the material day at about 8.30 PM, he heard somebody jump over his fence knock at the sitting room door and window. He stated that the security lights were on and he saw it was PW2 who was in shock and asked him for assistance because his father had been shot.
  33. He went out through his gate and they entered the compound of PW1 which had its gates wide open. They entered the kitchen where PW2's father lay down crying and in pain. There was blood everywhere. They took him to Bahati hospital and later to Nakuru PGH where he passed on that same night. The x-ray showed that there was a bullet lodged in his body.
  34. PW3 stated that he never heard any commotion or gun shots. His house is a permanent one similar to that of the deceased though he had never entered into the house of the deceased.
  35. PW4, the 2<sup>nd</sup> Accused's friend stated that they were born in the same village. He testified that on the material day he was in a pool house at around 8 PM when they had wails and shouts. The wails were from PW2's home and they went there. They were around 30 people.
  36. He narrated that in May of the same year the 2<sup>nd</sup> Accused had asked him if there was somebody at the Centre who possessed money and the whereabouts of the deceased's residence (PW2's father) who had an Mpesa and sold clothes.
  37. PW4 stated that they proceeded to the 2<sup>nd</sup> Accused home and upon reaching some junction they saw two people and one of them had a big spotlight. This was about 200 metres from the place they had met the other person who was moving into the coffee farm. The torch pointed at them. They were with about 5 motor bikes each three people. It was now about 9 to 10 PM.
  38. PW4 stated that the person asked them in Kikuyu what they were doing at that place. The voice was that of the 2<sup>nd</sup> Accused which he knew and could recognize. Suddenly they had a gun shot and they dispersed.
  39. On cross examination, he asserted that they were going to the 2<sup>nd</sup> Accused's home to check on him because they suspected him. He stated that the next day the 2<sup>nd</sup> Accused and his wife disappeared and that is when the public burnt his house.
  40. PW5 like PW4 also comes from Kabaazi. He narrated that on the 30/7/2016 in the morning he was going to his place of work and met the 2<sup>nd</sup> Accused's wife who asked him to assist her with his phone. He stated that she told the person that she called that if the 2<sup>nd</sup> Accused was there, he should hide because it was being said that he had a gun and that the police were looking for him. He gave his phone to the police because the number that she called remained in his phone.
  41. It was his testimony that he was called by a man at about 10.30AM who was asked if he would meet the 2<sup>nd</sup> Accused's wife. He responded that he would not meet her. He was advised by his co-workers to report the calls. He reported at Kabaazi Police Station where he was detained for 2 days and released thereafter.
  42. PW6 is a mechanic at Kabaazi who stated that on the material day at round 8 PM he was walking home when he met the deceased on his motor bike. There was a big light around where they met which is next to the deceased's home. That he heard the deceased close his gate as he was near that place. Shortly



- after, he heard some commotion and kind of people running and then gunshots. He ran to his house which is two plots away from that of the deceased and called the police and a neighbor from his house. He then came out and hid near the gate where he saw PW2 coming out of the fence calling neighbours. PW2 was saying that they had shot his dad.
43. PW6 joined the neighbours and took the injured to hospital. He drove the vehicle to hospital. The injured was in the kitchen. He stated that at the hospital he saw the X-ray of the deceased and that a bullet was lodged in his spinal code. He stated that PW2 had informed them that the thugs had left with his mother (PW1).
  44. PW7 is a medical practitioner who produced the medical report (P3 form) regarding PW1. He testified that the victim was stable but very stressed. The report was prepared after about two months from the date of the incident. He stated that he relied on the treatment notes issued at Kabaazi.
  45. PW8 was the arresting officer who arrested the 2<sup>nd</sup> Accused. He stated that he had information that the person who had committed a crime in Subukia was within his jurisdiction at Mwisho wa Lami. He along with his colleagues effected the arrest on 10/3/2017 at about 8.00PM. The person who informed them about the whereabouts of the 2<sup>nd</sup> Accused person had stayed with the wife of the 2<sup>nd</sup> Accused after the he differed with his wife. She disclosed the commission of the offence to the informer who had hosted her. The informer was a relative to the wife of the Accused.
  46. PW9 is an officer, a dog handler, who was stationed at Subukia at the time of the incident. They were on patrol when they were called for re-enforcement and on reaching the scene they found the deceased had been shot. They were also informed that boda boda people had pursued the assailants and that a confrontation occurred where the boda boda people had been shot at. They proceeded to the other scene and they started doing scent hunting using the police dog after they were shown the direction the assailants escaped to. The scent tracking dog led them to the 2<sup>nd</sup> Accused's house and stopped at his door.
  47. PW9 stated that the 2<sup>nd</sup> Accused's wife opened for them and told them that her husband had been there with two friends from Nakuru Flamingo but they had left with a motor bike. She also said the husband came later at 9.00pm, changed his clothes and left. The officers searched the house and found nothing incriminating. They also searched the house of the 2<sup>nd</sup> Accused's sister and found nothing but she told them that her brother lived a suspicious life.
  48. He stated that the tracking dog could not be wrong because the scent was fresh and it was not windy and that during the search they also passed through other homesteads.
  49. On cross examination he stated that he had never seen or known any of the Accused persons. No cartridges were recovered. He confirmed that the 2<sup>nd</sup> Accused's wife told them that the 2<sup>nd</sup> Accused had come to the house at about 9 PM with his friends where he changed and they left together.
  50. PW10 an officer who was among the first responders at the scene of crime testified that he was called by one Kitime from Kabaazi informing him of the incident. He rushed to the scene with his colleagues where they found a crowd of people at the scene. The injured had been taken to hospital. There were blood stains at the victim's house. They searched for cartridges but found none.
  51. The officer said that he called for the tracking dog. He also mobilized members of public to search for PW1 who was later brought. She was confused and said that she had been raped in the maize plantation. She narrated her ordeal to the officers.



52. The dog handler came and the dog led them to a homestead belonging to the 2<sup>nd</sup> Accused. The attackers had also shot at boda operators who were pursuing them and they had retreated. They were informed at the homestead that the 2<sup>nd</sup> Accused had come back at about 9.00PM, changed and then left.
53. On cross examination, he stated that the tracking dog took them to the 2<sup>nd</sup> Accused's home door and not any other door. He asserted that the distance between the scene to the 2<sup>nd</sup> Accused's residence is about 1KM.
54. PW11, a police officer testified that on 30/7/2016 at about 9.30 am, they visited the scene of crime. They searched the scene but did not find any spent cartridges. That the DCIO (PW 14), who they were with at the scene, told them an informer had told him that an administrative police officer from Nakuru was involved in the incident. They then proceeded to Nakuru North DAPC where the 1<sup>st</sup> Accused was stationed and picked him up as a suspect for questioning. They were informed that the 1<sup>st</sup> Accused was on duty the previous day. He also stated that they never went to the 1<sup>st</sup> Accused's house and they did not take his service firearm.
55. PW12, a firearms expert from DCI headquarters, Nairobi testified that he received a bullet for examination from Subukia Police Station. He examined the exhibit and made findings that it had dry blood on it and that the bullet may have been shot from a homemade gun or from an AK47 with a worn out barrel. (See report Exhibit 6).
56. PW13 participated in the post mortem exercise and identified the deceased. He was shown the bullet that was extracted from the body of the deceased. He was also at the scene of crime as a responder but found that the deceased had been taken to hospital.
57. PW14 is the investigating officer and the then DCIO Subukia. He stated that on 30/7/2016 at around 10 AM accompanied by his colleagues, he visited the scene of crime. They found many people at the scene including the complainants (PW1 and PW2). The compound had a perimeter wall fence, permanent house and a gate. He talked to PW1 who was weak and in bad shape. PW1 narrated how her husband was attacked by four men as he opened the house door to enter. He restated the scenario as narrated by PW1. He stated that he also talked to PW2.
58. The IO said that when they arrived in the house, it had been arranged and he did not see any blood. They did not find any spent cartridges. The bullet head had been removed from the body of the deceased. PW1 told them if she saw the attackers, she would identify them as they had not covered themselves and there was sufficient light.
59. He ensured that the exhibit memo was done forwarding the bullet recovered from the body of the deceased for forensic examination. He also interviewed people at Kabaazi Market and then went to the home of the 2<sup>nd</sup> Accused who was a suspect. He asserted that they tracked his telephone number but did not get any links.
60. Further, the IO stated that he talked to an informer who told him that on the day of the incident, Accused 2 had visitors and one of the visitors was a police officer called Kimani who was stationed at Bahati (Accused 1). The informer told him that he had seen them (both Accused persons) material day at Kabaazi playing poker during the day. The informer was a neighbor to the 2<sup>nd</sup> Accused. The informer also said he saw both of them entering the residence of the 2<sup>nd</sup> Accused at about 10PM while armed with a gun and with a motor bike.
61. The IO testified that on the basis of that information, they proceeded to the 1<sup>st</sup> Accused's workplace and arrested him. The 1<sup>st</sup> Accused was off duty but resided within his workplace (DC's). The officers



- did a search but did not find anything of interest. They also interviewed other officers at the camp but none of them could remember the movements of the 1<sup>st</sup> Accused during the previous day. There were no OB records in the camp. The 1<sup>st</sup> Accused denied involvement in the incident.
62. The officer stated that he did an identification parade on 31/7/2016. In the parade were 8 AP officers in civilian clothes, complainant (PW1) was brought from hospital by a doctor and relatives and the parade was conducted with no objections and as per procedure. (See exhibit 4) PW1 identified the 1<sup>st</sup> Accused as one of the assailants and as the one who raped her. PW1 broke down.
  63. That after the parade, the 1<sup>st</sup> Accused said he was not satisfied with the parade because he resides in Kabaazi and people know him. The 2<sup>nd</sup> Accused was arrested and charged later after he had been transferred from Subukia. The phones stolen were not recovered and they could not trace where the money was transferred to. The gun was not also recovered. During the investigations they did not find any business rivalry within the area to warrant the commission of the offences. He stated that during that period, robberies were rampant around Bahati and Kabaazi.
  64. During cross examination, the witness stated that he had information from an informer and he also conducted an identification parade and that was the basis of him charging the 1<sup>st</sup> Accused. That the service firearm that the 1<sup>st</sup> Accused had was a G3 rifle and that the firearm they had interest in was an AK 47 hence why they never took the one the 1<sup>st</sup> Accused had been allocated.
  65. He further stated that the recipient of the transferred money was not traced though the particulars in transaction reflected Kalenjin names.
  66. The witness finally produced the following exhibits:
  67. P3 Form –Exhibit 1
  68. ID Parade Form-Exhibit 4
  69. PW15, the pathologist who performed the post mortem on the deceased and extracted the bullet that was lodged in his body stated that there was one gunshot entry on the left chest exiting at the back of the lung. (See Exhibit 2).
  70. PW16, a medical officer produced the PCR form regarding PW1. (See exhibit 8). She stated that PW1 was traumatized and disturbed.
  71. PW17 produced the exhibit memo forwarding the recovered bullet for analysis. He also attended the post mortem of the deceased.
  72. PW18 conducted the ID parade regarding the 2<sup>nd</sup> Accused. He testified that he followed the procedures for conducting ID parades and explained the same to the Accused. PW1 and PW2 did the ID parade and touched the 2<sup>nd</sup> Accused in the parade as being one of the assailants. He produced ID parades forms. (See exhibit 9A and 9B).
  73. At the close of the prosecution case, the trial court found that the Accused persons had a case to answer. During the defence hearing, the 1<sup>st</sup> Accused denied the charges. He stated that he was arrested on 30/7/2016 from his work place at Bahati New AP Camp.
  74. That on 29/7/2017 he left his place of work at about 4.30 PM and went to meet his friends. He went to a club at Kabatini called Jamaica with his friend called Ben at about 7PM and they were joined by his other friend called Njihia at about 8PM. They then went to another club at Mairo Kumi which is 7 Km away from Jamaica club. They used Ben's vehicle as he had left his motor bike at some police station which is 100 meters away from Jamaica club.



75. On arriving at the club, they found that there was no electricity and they decided to go back to Jamaica club. They stayed there for about 30 minutes and thereafter he went to the station to pick his motorbike and at the station he met PC Waithera and SGT Ochieng. He picked his motor bike and went to pick his girlfriend (DW4) from her house and they went back to his camp and arrived at about 9.15PM.
76. On 30/7/2016 at about 1PM he was picked up by officers from Subukia who wanted to interrogate him about a case that had happened in Subukia. They booked him at Subukia Police Station and never told him anything until the next day 31/7/2017 when the I.O told him that he was mentioned regarding the incident at Kabaazi. The Accused then did a statement of inquiry. (See Defence Exhibit 1).
77. He testified that on the same day an ID parade was conducted and that PW1 never participated. He only saw people in a car that was stationed 50 meters away from the parade and the occupants kept raising and lowering the wind screens. Then a lady in the vehicle signaled the investigating officer and thereafter the IO went to the parade and said the occupants in the vehicle had identified 1<sup>st</sup> Accused.
78. He stated that he was not satisfied with the parade. That he had been within Bahati for 3 years and therefore was well known. That he saw the 2<sup>nd</sup> Accused in court for the first time and that he had not received any money that was transferred from the victims and nothing was recovered from his house.
79. DW2 was stationed at Bahati Nakuru North with 1<sup>st</sup> Accused and he was in charge. There was a third officer in the camp. He handed over the camp to Accused 1 on 29/7/2017 at about 6.30AM. DW2 left the camp and came back at 4.30PM and that is when Accused 1 left to go charge his phone at Bahati. That the Accused came back at about 9.30 PM with a lady friend on a motor bike. The next day the Accused was arrested. He stated that he had worked with the 1<sup>st</sup> Accused for three years and that he was not capable of doing such acts.
80. DW3 was a driver who is a friend to the 1<sup>st</sup> Accused since the year 2007. He stated that he met the 1<sup>st</sup> Accused with one Benson Muganga in Jamaica club on the material day at about 7PM. They later went to Mairo Kumi and while there they went to a club called Embassy but they found there were no lights so they returned to Jamaica Club which is about 10 km apart. They were using Benson Muganga's car. They arrived at Jamaica club at about 8 PM and continued with their drinking.
81. Later Benson wanted to go home and they departed at the club door. He walked with Accused 1 to the station at about 8.30PM where he had parked his motor cycle. DW2 waited for Accused 1 outside the station gate. He stated that he wanted to use the Accused's motor bike the next day but when the 1<sup>st</sup> Accused came from the station he said he would think about it and they went their separate ways at about 8.40 PM. He stated that the Accused told him that he was going to pick somebody.
82. DW4 who was identified as the 1<sup>st</sup> Accused's girlfriend testified that the Accused came for her at about 9.15 PM at her house using a motor bike. They went to the Accused's residence and arrived at about 9.30PM, prepared supper, ate and slept. He had no gun and that there was no police officer at the camp. She left the house at 6.00AM. She later heard he had been arrested.
83. On cross examination, she asserted that the Accused had called her saying he was going for his motor bike from the station where he had left it. That the Accused told her he was with his friends but had left the friend (DW 3) who wanted to borrow the bike at the center as he went for his motor bike.
84. DW5 the 1<sup>st</sup> Accused's brother stated that He was told of the arrest by the Accused. He testified that he was in the identification parade done on 31/7/2016. A vehicle stood about 10 meters away from the parade and there were three ladies and a male driver in that vehicle. The occupants never stepped out of the vehicle. The IO told them that the witness was sick and on a drip and would not come out and that she had identified the first Accused. That he protested about that.



85. DW6 is an officer who was at the station where the 1<sup>st</sup> Accused allegedly left his motor bike. He stated that the Accused came at about 8.30PM and said hello to him at the gate. The witness was talking to the duty officer one Josephine Waithera. He stated that the Accused was alone and he left him talking to the duty officer at the gate.
86. Lastly, accused 2 also denied the charged and gave his account of what happened on the material date and the days that followed.
87. The directions were given for appeal to be canvassed via submissions but only appellant filed the same as at the time of crafting this judgement.

## 102. Appellant's Submissions

88. On burden of proof the Appellant relied on Article 50 (2) (a) of *the Constitution* of Kenya, 2010, Sections 107-109 of the *Evidence Act*, David Wahome Wanjohi v Republic [2015] eKLR, Republic v Philemona Kidaywa Gaika [2016] eKLR.
89. On standard of proof, the Appellant cited the cases of David Wahome Wanjohi [Supra] and Republic v Wilson Learpora [2007] eKLR.
90. The Appellant asserted that the Appellant was convicted on the strength of the evidence of an undisclosed informer who was never called as a witness or subjected to cross examination which is against the rules of natural justice, *the constitution* and judicial decision. They cited the case of Florence Wangechi Gitare v Republic [2015] eKLR.
91. It was submitted that it was very convenient for the investigating officer who was short of inculpatory material to seek refuge in hearsay evidence of an undisclosed informer who allegedly knew that the robbery was about to take place hours before it did, witnessed the crime, went ahead to witness the get away and survived to tell the story but was too protected to give evidence in court.
92. The Appellant averred that the investigating officer began and concluded investigations after a police informer entered into the scene in a matter of hours and the investigation officer conveniently set up an identification parade from which the Appellant was allegedly positively identified. This was despite lack of anything material to connect the Appellant to the crime including any forensic evidence, recovery of any weapon, phone conversation, linkage over M-pesa and Equity Bank transactions, recovery of exhibits stolen, relationship with the deceased and uncontroverted alibi. Reliance was placed on Republic v Kelvin Kamau Gatora & 2 Others [2018] eKLR.
93. It was asserted that the prosecution case was full of inconsistencies in regards to who made the report to the police, whether the investigating officer or the MCA confronted the complainant with a photo of the Accused person on 30<sup>th</sup> July 2016 before effecting the arrest, whether the assailants concealed their faces and whether PW1 identified the 1st Accused person by touching during the conduct of the identification parade.
94. It was argued that the victims did not know the Appellant before the incident and the offence happened at night. Under those circumstances, the complainant's evidence needs to be considered very carefully to ascertain whether the victims indeed saw the persons who robbed them on the date in question to be able to subsequently identify him without a possibility of error or mistake.
95. Reliance was placed on Wilson Kamotho Giuthi v Republic [2018] eKLR and David Karongo Gathui v Republic [2006] eKLR.



96. The Appellant asserted that in the absence of compliance with the strict rules of identification, it cannot be concluded that he was properly or positively identified and therefore his conviction ought to be quashed as it was influenced by public pressure.
97. On the issue of the light available for the purposes of identification, reliance was placed on David Karongo Gathui [Supra], Cleophas Otieno Wamunga v Republic [1989] eKLR and Erick Ouma Ondutu v Republic [2020] eKLR.
98. The Appellant castigated doubts on the variance between what was included in the original charge sheets versus the amended charge sheet in each of the counts. He stated that it showed lack of proper investigations leading up to his arrest and arraignment followed by investigations midtrial which is the exacerbated by arrest and arraignment of the 2<sup>nd</sup> Accused person a year later.
99. Further, the Appellant stated that from the medical report it was hard to ascertain forceful vaginal penetration. The case of Gerishon Gichera Muremi vs Republic [2017] eKLR was cited.
100. It was contended that the defence of alibi as provided by the Appellant and corroborated by others was not proven otherwise by the prosecution. Reliance was placed on Wycliffe Shakwila Mungo v Republic [2018] eKLR and Victor Mwendwa Mulinge vs Republic [2014] eKLR.
101. In conclusion, the Appellant submitted that inconsistencies and/or contradictory in testimony during the trial lends itself towards tilting the scale in favour of the Appellant. Reliance was placed on Philip Muiruri Ndaruga vs Republic [2016] eKLR. That the evidence adduced by the prosecution only established that a robbery was committed and that the deceased was killed but if failed to prove that the Appellant was part of the gang that committed the offence as charged.

### **117. Analysis and Determination**

102. This being the first appellate court, the court's duty is well spelt out; namely it is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. (See Okeno vs. Republic [1972] EA 32.)
103. Further, in Kiilu & Another v Republic [2005] 1 KLR 174 the Court of Appeal held that:
  - “a. “An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1<sup>st</sup> Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1<sup>st</sup> Appellate Court to merely 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 finding 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. ....”
104. Inevitably, this court in determining this appeal ought to satisfy itself that the ingredients of the offence of robbery with violence and rape were proved and as so required in law; beyond any reasonable doubt.
105. In the present case, the Appellant was convicted with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code CAP 63 and one count of rape contrary to Section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006.



106. With regards to the offence of robbery with violence, the same is contained in Sections 295 and 296(2) of the Penal Code as follows: -

“295. 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(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

107. Additionally, the elements of the offence of robbery with violence were set out by the Court of Appeal in the case of Oluoch –v – Republic [1985] KLR thus:

“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 .....

108. According to the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007:

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

109. In a nutshell, PW1 testified that they were attacked in her house by three men wielding guns as soon as her husband got home from work. The complainant clearly stated that one of the three men had a long gun whereas another had a short gun. She stated that the tall one pulled the husband into the kitchen and she heard them saying that they were going to kill him. Shortly thereafter she heard a gunshot. The result of this encounter was fatal to the husband. PW15, the pathologist who performed post mortem on the deceased’s body extracted the bullet from the deceased’s body confirmed that the deceased died as a result of the gunshot. He stated that the cause of death was severe chest injuries caused by bleeding and lacerations as a result of a near contact gun shot.

110. PW1 testified that the three assailants came into the bedroom that they were in and demanded for money. She told them she had Kshs 15,000 and that she had money in the phones for Equitel (22,363/) and M-pesa (Kshs 30,000/). She had already given them Kshs 15,000/. She testified that the 2<sup>nd</sup> Accused took 5 phones from his pocket and asked her which one belonged to her. The phones belonged to her, her husband, her son and for their money transfer business.

111. Further, she narrated that the 2<sup>nd</sup> Accused held her by the hand and told her that they should leave together. As they left she saw another person outside the house. He was inside the compound next to the gate. About 5 security lights were on. This would be the fourth assailant.

112. It was her testimony that they reached a second farm and that is where they instructed her to transfer the money that was in her phones to some number. The assailants had called someone who gave them



- the number that the money was transferred into. She transferred Kshs 30.000/- to that number which indicated to be registered in the names of one Frank Bett. She asked them to get an account number for a further transfer. The assailants called someone again but they were not given the account number and that is when they took away her phone with the “PIN” number.
113. PW2 echoed PW1’s testimony of the events that transpired on that fateful night. He corroborated PW1’s testimony. Both witnesses stated that they were able to identify their assailants and particularly the Appellant herein as there was electricity and they had not concealed their faces.
114. PW3 and PW6 were among the first responders who found the deceased shot and rushed him to hospital. PW6 even stated that he met the deceased as he was going home and heard a commotion then a gunshot after the deceased entered his house. The investigating officer testified on the sequence of events that led to the arrest of the Appellant and his Co-Accused. He stated that the phones stolen were not recovered and they could not trace where the money was transferred to. The gun was not also recovered
115. Having evaluated the evidence as a whole, I find that the essential elements of robbery with violence were proved by the prosecution. I find that the complainant and her family were attacked by men armed with guns as soon as her husband, the deceased got home. As a result of the attack, the deceased was fatally shot and four phones and money were robbed from them as enumerated in the three counts of robbery with violence.
116. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that; (i) the offender(s) were armed with dangerous and offensive weapon or instrument; (ii) the offender was in company with one or more person or persons; and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them in as envisaged in the aforementioned case of *Oluoch vs Republic* [supra]
117. Additionally, the Appellant was charged with one count of rape contrary to Section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006.
118. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;
- “He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
- a) The other person does not consent to the penetration; or
- b) The consent is obtained by force or by means of threats or intimidation of any kind.”
119. The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act
120. As regards to the offence of rape; PW1 was adamant that it was the Appellant only who had raped her. She stated that the assailants dragged her outside and she was taken to a neighbouring maize field. They instructed her to transfer the money that was in her phones to some number and then the Appellant asked the other assailants to move away. He then asked PW1 to remove her clothes but she resisted prompting the 1<sup>st</sup> Accused to ask for the small gun. He was abusing her and saying that he would kill her. He told her to kneel down and she complied and then he raped her. She stated that the assailants were using light from a mobile torch and that when the ordeal was over they pointed it to their faces asking her if they could identify any of them. PW10 testified that he mobilized members of public to



search for PW1 who was later brought by members of public. She was confused and she said she had been raped in the maize plantation. She narrated her ordeal to the officers.

121. PW7 is the medical practitioner who produced the medical report (P3 form) regarding PW1. He testified that the victim was stable but was very stressed. He stated that he could not make a conclusion that a rape had occurred but lack of injury does not mean there was no rape. PW16, a medical officer produced the PCR form regarding PW1. She stated that PW1 was traumatized and disturbed. She also stated that upon examination there was evidence of an old broken hymen and her conclusion was that there was no physical evidence to suggest penetration though the history of the patient was suggestive.
122. Although, the medical evidence could not show evidence of forceful penetration, I cannot rule out the fact that rape occurred as PW1 is a mother and wife and therefore it is my opinion that she was someone who had had sexual intercourse before hence the old broken hymen, as was confirmed by PW7 who stated that the hymen had been broken which is consistent with someone who is already married. Further, the P3 form was filled on 29/7/2016 and yet the incident occurred on 29/7/2016 which is two months after the incident. The court is also a live to the proviso to Section 124 of the [Evidence Act](#) that evidence of a sexual assault victim can support a conviction if the court believes that the victim is telling the truth. I am satisfied that the trial court was right in finding that PW1 had been raped.
123. Now, I turn to the principal issue for determination in this appeal which is whether the prosecution proved beyond reasonable doubt that the Appellant is the one who committed the aforementioned offences. The issue of identification is vital and the Appellant's appeal majorly revolves around this ground. It is crucial for this court to determine the chain of events leading to the Appellant's arrest and eventual arraignment in court particularly who made the first report; the visual identification and the conduct of the identification parade.
124. Identification has been defined by the Black's Law Dictionary 2<sup>nd</sup> Edition as:
- “Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them –‘Identitas vera colligitur ex multitudine signorum’”.
125. The importance of identification of an Accused in a case of robbery with violence was indicated by the Court of Appeal in the case of *Suleiman Kamau Nyambura v Republic* [2015] eKLR where it stated that: -
- “In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set-out ingredient of robbery with violence is the need to positively identify the assailant/s in question.”
126. In the cited case of *Republic vs Turnbull & Others* [1976] 3 ALLER 549 Lord Widgery CJ laid down the circumstances necessary for consideration whenever an issue of identification of perpetrator is in question namely:
- How long did the witness have the Accused under observations?
- What was the sufficiency of lighting?
- Was the observation impeded in any way as for example by passing traffic of group of people?



- Had the witness seen the Accused before and if so, how often?
- Were there any special features about the Accused?
- How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seen and the actual appearance?
127. Further, on the issue of identification, the Court of Appeal's decision in the case of *Mwaura vs Republic* [1987] KLR 645 is relevant. The said court held as follows:
- “In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the Accused and the quality of light.”
128. The court in *Wamunga vs. Republic* (1989) KLR 424 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 favourable and free from possibility of error before it can safely make it the basis of a conviction.”
129. Moreover, in *Maitanyi v Republic* [1986] eKLR the Court of Appeal stated that in determining the quality of identification of using light at night, the court stated as follows:-
- “...How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded if any was....? Had the witness ever seen the Accused before? How often? If only occasionally, had he any special reason for remembering the Accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the Accused given to the police by the witness when first seen by them and his actual appearance... 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.”
130. PW1 testified that during the attack the house lights were on. She stated that one of the three men had a long gun whereas another had a short gun. One of the assailants was tall and wore a long black / greyish jacket and a white tee shirt. His face had things like pimples. He was the one with the long gun. The one with a short gun wore a jumper and had a bald head. The third one wore a maroon jacket but did not have a gun. She further asserted that all of them had not covered their faces. The witness said that the one with the shot gun was 2<sup>nd</sup> Accused and the one with the long gun was the 1<sup>st</sup> Accused (the Appellant herein).
131. It was her testimony that she was then dragged out of the house and that the assailants had been in the house for about 40 minutes. That the security lights were also on outside. While at the neighbouring farm, PW1 stated the short one among the assailants used the mobile torch and pointed it to his colleagues asking her whether she could identify any of them to which she responded in the negative.
132. After about three days she was informed that some three people had been arrested and she went to conduct the identification parade. She identified the 1<sup>st</sup> Accused in the parade from the marks on his face and that the assailants had no masks and the house lights were on. She also identified him as the person who raped her.



133. On the other hand, PW2 confirmed that electric lights were on in their house when they were attacked. PW2 stated that two people entered the bedroom and demanded for money which PW1 took from the cupboard and gave the thugs. PW1 then said she would get more from the phones which by then were misplaced in the confusion. that he tried to get up to go look for the phones but he was ordered to lie down by one of the thugs who had a long coat and wore sports shoes which had mud on them. That the person who had a face with spots with a fair complexion and was bald headed was Accused one (the Appellant). PW2 said that he saw two people but he would hear another one murmuring in the kitchen.

134. On re-examination, he reiterated that he had stood up from the floor where he had sat to go assist her mother get the phones as requested by the assailants and that is when he saw the assailants.

135. In *Hassan Abdallah Mohammed v Republic* [2017] eKLR, it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested.”

136. The court in *Donald Atemia Sipendi v Republic* [2019] eKLR stated as follows: -

Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence. In *Charles O. Maitanyi vs Republic*,<sup>1</sup> it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.

Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in all contested cases. However, the memory is a fragile and malleable instrument which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in miscarriages of justice.

.....

I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the Accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as: -

What were the lighting conditions under which the witness made his/her observation? What was the distance between the witness and the perpetrator? Did the witness have an unobstructed view of the perpetrator? Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator? For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed? Did the witness have a particular reason to look at and remember the perpetrator? Did the perpetrator have distinctive features that a witness would be likely to notice and remember? Did the witness have an opportunity to give a description of the



perpetrator? If so, to what extent did it match or not match the Accused, as the court finds the Accused's appearance to have been on the day in question? What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

The positive identification of an Accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the Accused to the commission of the offence, is likely the most significant evidence of the prosecution.

137. Accordingly, it is salient for this court to interrogate whether the trial court tested the circumstances and conditions for identification; since the crucial evidence was based on identification. The trial court was enjoined to treat the evidence with great care and to test it whether it was free from error.

138. In the present case, the robbery took place at night; at around 8.30 pm and went on for about 40 minutes, but that there was light from the electric bulbs in the house and the assailants were unmasked as asserted by PW1 and corroborated by PW2. The trial court in its decision was satisfied that there was sufficient day light to enable the witnesses to identify the Appellants and it made the following finding;

“It is also important to note that the incident happened at about 8.30pm when the lights were on in the house of the victims. The attackers had not covered themselves. The attackers spent about 40 minutes in the house. In these circumstances there was ample time for the victims to recognize the attackers. Visibility was clear.

The victims in their description of the attackers is strengthened by the identification done by the victims at the identification parades conducted”

139. From the evidence on record on the manner in which the robbery occurred, it is also my finding that the conditions present were favourable for identification. Both witnesses in this case stated that the attack happened for between 20 minutes as testified by PW2 and 40 or 50 minutes as stated by PW1 therefore the attack happened for an average of about 40 minutes. The assailants attacked them in their house where the electric bulbs were on providing light for them to see what was going on. The witnesses further confirmed that the assailants were unmasked. Particularly, the complainant identified the Appellant as tall and wore a long black /greyish jacket and a white tee shirt. His face had things like pimple and he was the one with the long gun. PW2 corroborated the complainant's testimony and stated that the person who had a face with spots with a fair complexion and was bald headed was the Appellant.

140. In *M'Riungu v Republic* [1983] KLR 455, the Court of Appeal held with respect to corroboration that: -

“As was stated in *R. v Baskerville* [1916] 2 KB 658 that corroboration need not be direct evidence that the Accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the Accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.”



141. It is instructive to note that the witnesses did not have a short and abrupt encounter with their assailants but they had unfortunately endured the attack for about 40 minutes indicating that they spent a considerable amount of time with the attackers. Taking into account that there was light from the electric bulbs and the amount of time assailants spent in the house, I find that there was more than sufficient time for PW1 and PW2 to identify the Appellant as one of the assailants. The witnesses had interacted with the assailants during the attack which had enabled them to look at them and see their faces and even offer a description of the physical features of the Appellant as one of them. The complainant was also able to see the appellant when they dragged her outside from the security bulbs light. It is clear from the testimony of PW1 and PW2 that the Appellant was unmasked. The witnesses were very consistent as regards the opportunity for identification of the Appellant as one of the assailants.
142. Consequently, I am satisfied that the conditions available at the time of the incident were favourable for the positive identification of the Appellant by both the complainant and PW2. I am satisfied with the trial court's finding that the conditions and circumstances for visual identification of the Appellant were favorable; this evidence was complimented by the identification parade; which then leads me to the issue of the identification parade and whether it was properly conducted or not.
143. The court must carefully scrutinize the conduct of the identification parade. The Appellant castigated doubts on the procedure followed by the investigation officer during the conduct of the identification parade. He stated that the trial court attempted to sanitize the procedure followed by the investigation officer during the conduct of the Appellant's identification parade despite a clear admission by PW14 that the Appellant was identified by pointing and not touching which was borne in the report itself. More so, it was their contention that PW14 admitted to having conduct of the identification parade which is contrary to the rules.
144. The Appellant also submitted that the trial court stated in its judgement that the main witnesses had made a report at the police station which was never the case. That PW1 and PW2 confirmed during trial that they never gave a description of the assailants to the investigation officer or any other officer before the arrest of the Appellant. As such, the Appellant was arrested exclusively on the evidence of an undisclosed informer.
145. Moreover, the Appellant argued that the learned trial magistrate erred in law and fact in failing to appreciate the fact that the investigating officer PW14 testified that after conducting a thorough and scrupulous investigation, he could not conclude that the Appellant was involved in the crimes he was accused of. The investigation officer gave evidence clearing the Appellant from blame and went ahead to testify that were it not for the positive identification by PW1 during the identification parade, the Appellant would likely no have been arraigned to court. The trial court is therefore entirely responsible for gravely curtailing the Appellant's right to freedom of movement, liberty and fair administrative process.
146. PW1 testified that on 30<sup>th</sup> she reported the incident at the police station. Later she was informed by police from Subukia that there were about 3 people who had been arrested and that she should go identify them. It was about 3 days after the incident.
147. She stated that when she went for identification, there were about 10 – 12 men. She looked at them and she identified Kuria (the Appellant) on that day. That there was a police officer who had asked her if she could identify any of them. That the Accused had different clothes from the ones he had on the day of the incident.



148. On cross examination, PW1 testified that on the day the identification parade was held, she was in Agnes Nduta's car. It was a Nissan X-trail. That she did get out of the vehicle and touch the Appellant. She confirmed that she was not shown a photo of Kuria by any police.
149. PW14, the investigating officer testified that he spoke to PW1 on 30/07/2016, she stated that if she saw two of her assailants, she could identify them as they had not covered themselves and she had seen them in the house which had light.
150. He stated that during his investigations, he got information from an informer who was also a neighbour. The informer told him that on the day of the robbery, the suspect (the 2<sup>nd</sup> Accused) got visitors at his house. One of the visitors was an AP officer attached at Bahati called Kimani. He stated that he knew them and had seen them during the day at Kabaazi playing 'poker cards'.
151. It was his testimony that the informer went on to state that after the robbery at about 10.00 pm., he saw the suspect and the AP officer enter the suspects residence with a gun and a motor bike.
152. He stated that he then went to Nakuru AP with his colleagues Oyugi and Omullema. At the D.C's place, they met the Administration Police officer in charge and requested them to hand over the suspect Kuria. They did not go to his house immediately but after he was brought to them where they did a search and did not find anything of interest.
153. That the Appellant handed over his service firearm, a G3 to the inspector but the description of the gun used would not be a G3. Further, there was no duty roaster. They interviewed the other Administration Police officers at the camp but none would recall the Appellant's movement the previous day and there are no OB records at that place.
154. PW14 went on to recall that they took the Appellant to his office and he denied the allegations and said that he was not in Kabaazi that day. The IO took his statement, arranged for an identification parade and booked him in the cells in Subukia.
155. He clarified that the parade was done on 31/07/2016 at 5.30 p.m. There were 8 members of the Administration Police force from Subukia. The complainant was brought from the hospital by relatives. The doctor was also present with the relatives. He explained to the Appellant the objective, purpose of the parade and his rights. He consented to the parade. The identification parade was done in an open place. He invited him and he chose where to stand among the 8 members. He had no objection to the arrangement of the parade.
156. He went on to explain that the Appellant stood between number 1 and 2 and that he chose that position. The complainant was in a vehicle at the back of our officers. She came being held by the doctor. She was speaking. He explained to her that there were 9 persons and one of them may or may not be the suspect. She identified him. She pointed at the suspect. She broke down and said he is the same person who raped her. PW14 stated that the suspect said he was not satisfied with the conduct of the parade. He said he resided in Kabaazi and people knew him.
157. PW14 took suspect back to the cells and later charged him in court the next day. He also stated that the phones were not recovered and that they followed the statements of where the money was sent to and could not trace its whereabouts. That the gun was not recovered.
158. On cross examination, PW1 recorded her statement on 22/8/2016 and PW2 did a statement on 26/8/19 after the Appellant was charged. That PW1 was ill. He reiterated that he got the information from the informer and that they also did an identification parade. That further statement was also recorded on 13/3/17. That is about the identification parade.



159. He stated that The MCA Kabaazi never gave him evidence and never showed him the photograph of the 1<sup>st</sup> Accused. That he did the identification parade as he was the senior most officer in the station. He also stated that PW2 at that stage would not identify the thug and that the scene was interfered with when he arrived.
160. On re-examination, PW14 averred that he did the statements after the Accused was arraigned. That the investigations were ongoing and they later added charges.
161. Before I delve into the issue of the conduct of the identification parade, I am compelled to detour to the issue of the first report. This is because the chain of events leading to the arrest and arraignment of the Appellant in court came from the prosecution witnesses who testified in this case however the investigating officer also introduced the element of an undisclosed informer who led to the Appellant's arrest. As I stated earlier the issue of identification in the instant matter is threefold; one of the limbs centers around who made the first report to the police.
162. It is important that I establish the nexus between the arrest of Appellant and the offence and to interrogate how the link between the Accused and the robbery was made since the police had no prior description of the Accused. The question of the informer who gave police the information implicating the Appellant leading to his arrest is contested by the Appellant.
163. The investigating officer stated that during his investigations, he got information from an informer who was also a neighbour to the 2<sup>nd</sup> Accused who identified the Appellant as someone who could be allegedly involved with the robbery. It seems from the evidence that the Appellant was arrested based on the information given by the undisclosed informer and then the identification parade was held whereby the complainant identified the Appellant.
164. In the case of Republic v Kelvin Kamau Gatora & 2 others [2018] eKLR the court stated as follows: -

“The issue of the police informers has been discussed in various decisions. In my view, in almost all the cases, especially cases of a criminal nature, police fail to disclose the identity of the informers who tipped them about an Accused person and their role in the case under trial. Police normally invoke the law as protecting such informers. On this issue, the Court of Appeal in Joseph Otieno Juma v Republic [2011] eKLR stated that:

“Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case their evidence was not necessary to determine the innocence or otherwise of the Appellant because the prosecution's other evidence served the purpose. However, we think that if the evidence of the informers is necessary to prove the guilt of the Appellant it would have been necessary for them to have testified perhaps outside the glare of the public.”

In the above case, the Court of Appeal cited with approval Kigecha Njuga v Republic [1965] EA 773 where it was stated that:

“informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

To my mind, in cases where the prosecution case is weak for lack of sufficient evidence and the evidence of the informer would make a difference in strengthening that case, it would be prudent to call the informer to testify and if it becomes necessary their evidence can be



taken in camera. Where there is strong evidence against an Accused person so that there is no need to have the informer testify, then the police need not call the informer to testify. The evidence of the informer becomes hearsay evidence and inadmissible unless there is other sufficient evidence to support prosecution case such that the evidence of the informer becomes unnecessary."

165. I strongly disagree with the Appellant's assertion that the entire evidence of the prosecution hinges on the evidence of identification which is shaky, inconsistent and gravely prejudicial to the Accused coupled with the fact that there was no single evidence connecting the Accused to the crime. It is my considered view that in the instant case, the chain of events that led up to the Appellant's arrest clearly involved the undisclosed informer's tip but the said informer did not account for the weight and/or strength of the prosecution's case. The Appellant was positively identified by two witnesses one of whom, was able to pick him out in the identification parade that was held shortly after the incident identifying him as one of the persons who committed the crimes.
166. The Appellant submitted that he argued that the undisclosed informer factor makes the prosecution's evidence severely weak and therefore it was essential for the prosecution to call the informer who gave the information that led to the arrest of the Accused person in less than 12 hours from the time of the occurrence of the incident to convince the court how the Accused was connected to the heinous crime. However, I am convinced that the failure to call the informer to testify was obviated by the fact that the identification parade aided in the identification of the Appellant who was also positively identified by PW1 whose testimony was corroborated by PW2.
167. In addition, the prosecution has the discretion to call any number of witnesses to prove its case; in line with my statement earlier, the failure to call the undisclosed informer does not water down the evidence adduced by the prosecution witnesses. I associate with the holding in *Donald Atemia Sipendi v Republic* [supra] that properly obtained, preserved and presented, eyewitness testimony directly linking the Accused to the commission of the offence, is likely the most significant evidence of the prosecution.
168. It also goes without saying that there are no set out timelines for when investigations should happen. If an investigation officer is led to believe that a suspect needs to be arrested; it is not for the court to question the same but to examine the entire weight of the evidence adduced in court against the suspect to determine his innocence or guilt for the offence he is being accused of. Ours is to ensure justice is delivered.
169. I now turn to the final limb under identification i.e. the conduct of the identification parade. The correct procedure of conducting an identification parade is provided for under Chapter 42 paragraph 7 of the National Police Service Standing Orders
170. The rules include the following: -
- The Accused has the right to have an advocate or friend present at the parade;
- a. ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
  - b. iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
  - c. iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);



- d. v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
  - e. vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
  - f. vii. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.
171. The Court of Appeal in *David Mwita Wanja & 2 others vs. Republic* [2007] eKLR emphasized on the importance of a properly conducted identification parade and expressed itself as follows:

The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See *R v Mwango s/o Manaa* (1936) 3 EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis *Njibia vs. R* [1986] KLR 422 where the court stated at page 424: -

- a. It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person Accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.
172. On the validity or otherwise of an identification parade, the Court of Appeal in *John Mwangi Kamau v. Republic* [2014] e KLR held as follows:

“Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in *John Kamau Wamatu v Republic – Criminal Appeal No. 68& 69 of 2008*. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants’ were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In *Gabriel Kamau Njoroge v Republic* [1982-1988] 1KAR 1134, this Court observed:-



“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the Accused and the police should then arrange a fair identification parade.”

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the Appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure” In *Nathan Kamau Mugwe v Republic- Criminal Appeal No. 63 of 2008* this Court faced with a similar situation expressed itself as follows:-

“As to the compliant in ground six that the witnesses had not given to the police the description of the Appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in *GABRIEL’s* case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness ‘SHOULD’ be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the Appellant, his evidence with regard to the identification parade ought to have been rejected.”

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court’s observations in *David Mwita Wanja& 2 others v Republic- Criminal Appeal No. 117 of 2005*:-

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See *R v Mwangi s/o Manaa* [1936] 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis *Njihia v Republic* [1986] KLR 422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect



is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person Accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an Accused/suspected person, the following procedure must be followed in detail: -

.....

(d) The Accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the Accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

173. From the trial court record, the complainant stated that she reported the incident at the police station on 30<sup>th</sup>, a claim that was confirmed by the investigation officer who stated that he spoke to her on 30/07/2016. Additionally, he asserted that she stated that if she saw two of her assailants, she could identify them as they had not covered faces and she had seen them in the house which had light. It is not clear whether the complainant described the Appellant prior to the parade and I cannot trace any evidence that she gave a description of the Appellant to the police however in my opinion, failure to describe a suspect prior to the parade cannot be the sole reason for discarding such evidence.
174. I associate myself with the holding of the court in Simon Kamau Mwangi & another v Republic [2018] eKLR which cited the case of Nathan Kamau Mugwe Cr. Appeal No. 63 of 2008 where the Court of Appeal expressed itself by holding that the ideal position would be for the witness to give a first description of the assailants for purposes of organizing an identification parade; and that an identification parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect.
175. According to the rules provided for the conduct of an ID parade by the National Police Service Standing Orders, it is stated that as a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts. In strict terms, this is a recommendation and not an obligation. Although it would have been appropriate for someone other than the investigating officer to conduct the parade, upon re-evaluating the evidence I find that no prejudice was occasioned disadvantaging the Appellant as a result of the investigation officer’s conduct of the parade.
176. Further, the Appellant argued that the complainant pointed at him during the ID parade instead of touching him. Notably, the parade was conducted days after the incident and the investigating officer stated that the complainant was not in a good condition to touch the Accused. I find the same to be true given the traumatic events that occurred on the material date and the loss of her husband. The guidelines do not pose a strict requirement that the witness should touch the suspect during the parade.



I do not think that the complainant pointing at the Appellant discredits the conduct of the parade and the evidential value of the resulting identification of the Appellant.

177. Additionally, from my analysis the officer followed all the guidelines for conducting the ID parade as per the National Police Service Standing Orders. In the prevailing circumstances, I find that the same was not prejudicial to the Appellant and did not lead to the miscarriage of justice in the circumstances and I find no reasons to reject the results of the ID parade. This court is also guided by the aforementioned decision where it was held that the identification parade is not invalidated merely because of failure to give a description in the first report; the important factor is to examine the conditions and circumstances of the visual identification and whether the trial court considered the same which I have already done.
178. I find that there is no lacuna found in the evidence of PW1 and PW2 that could lead to the possibility of mistaken, induced or tainted identification; both of them identified the Appellant as the robber who was armed with the long gun; and that the visual identification evidence was complimented by the identification parade where PW1 identified the Appellant. Therefore, this court is satisfied that the identification the Appellants was positive and free from error. My conclusion to this issue is that I am satisfied that the ID parade was properly conducted.
179. The identification of the appellant as extends to the offence of rape as well. The complainant was consistent and adamant that it was the appellant who raped her as she gave her testimony.
180. The Appellant asserted that the learned trial magistrate erred in law and fact in failing to apply his mind to the testimony tendered by the prosecution and defence witnesses as well as the submissions on record which would inevitably have led to a different conclusion. He submitted that the trial court attempted to discharge the defence of alibi which is a preserve of the prosecution and on so doing, it displayed a bias towards the prosecution and prejudice against the Appellant as would disentitle it from being a fair arbiter.
181. I have carefully re-examined the trial magistrate's assessment of the Appellant's defence and I find that the trial court's analysis of the same was meticulous and the defence never overturned the prosecution evidence; the trial court was not convinced and disregarded the defence as a mere denial.
182. I have scrupulously scrutinized the testimony of DW1, DW2, DW3, DW4 and DW6 and the trial court's sound assessment of the Appellant's defence on page 38-47 of the trial court's judgment and I wholly agree with the learned trial magistrate that the narrative and timings of the movements are contradictory. Subsequently, this court is satisfied that the defence of alibi did not raise any serious doubts on the prosecution's case.
182. The Appellant also argued that the prosecution evidence was contradictory and inconsistent. In any criminal trial where several witnesses testify, there are bound to be contradictions or some inconsistencies. Such inconsistencies and or contradictions may be ignored if they do not go to the root of the prosecution case, otherwise they should be resolved in favour of the Accused.
183. I have thoroughly analyzed the trial court's record and I have not noted any grave contradictions and/or inconsistencies that would warrant this court to overturn the trial court's decision on this ground. The witnesses recounted what happened and what they knew and were consistent in their testimonies before the trial court.



184. Moreover, in *KGM v Republic* [2021] eKLR the court cited the Nigerian Court of Appeal case of *David Ojeabuo v Federal Republic of Nigeria* [2014] LPELR-22555(CA) cited in the case of *Cyrus Maina Gakuru vs Republic*, Criminal Appeal No.58 of 2014, where the court stated as follows:-

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

185. In the case of *Twehangane Alfred v Uganda* (Cr.App.No.139 of 2001[2003] UGCA it was held that it is not every contradiction that warrants rejection of evidence. The court delivered itself thus:

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

186. The Court of Appeal In the case of *Philip Nzaka Watu v. Republic* [2016] e KLR, held that: -

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

187. Furthermore, in *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the Accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an Accused person will be entitled to benefit from it.

189. Subsequently, I find that there were no gaps found in the evidence of PW1 and PW2 that could lead to the possibility of mistaken, induced or tainted identification; both of them identified the Appellant as the robber who was armed with the long gun. The visual identification evidence was complimented by the identification parade. This court is satisfied that the identification of the Appellant and the cumulative effect of the evidence against him was positive and free from error.



190. In regards, to the offence of rape, I find that the prosecution proved its case against the Appellant having established the necessary ingredients for the offence to the required standard of proof of beyond reasonable doubt. This court is satisfied that the offence of rape was proved to the desired threshold and the conviction on the same was safe.
191. In view of the foregoing analysis, I find that the prosecution proved its case against the Appellant for the three counts of robbery with violence contrary to Section 296 (2) of the Penal Code CAP 63 and the one count of rape contrary to Section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006, having established the necessary ingredients for each of the offences to the required standard of proof of beyond reasonable doubt.
192. With regard to sentence, Section 296(2) provides for the death sentence in respect to the offence of robbery with violence. On the other hand, The Appellant argued that the learned chief magistrate handed down an illegal sentence in view of the fact that death sentence is no longer legal in our jurisdiction and that the conviction and sentence is dangerous, shambolic and against the weight of the evidence tendered by the defence and the law ought to be overturned in earnest.
193. In The Court of Appeal case of Bernard Kimani Gacheru v Republic [2002] eKLR, the following was stated with respect to sentencing:
- “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or considered some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
194. In Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, the Supreme Court in the while dealing with the mandatory nature of the death penalty in murder cases under Section 204 of the Penal Code held that the mandatory nature of the death penalty was unconstitutional.
195. Thereafter, the Court of Appeal extended the rationale in the aforementioned case to similar mandatory sentences including the mandatory death sentence penalty in robbery with violence and sexual offences cases. (See William Okungu Kittiny v R [2018] eKLR & Dismas Wafula Kilwake v R [2018] eKLR.)
196. Nevertheless, the Supreme Court in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR issued directions to the effect that the Muruatetu Case as it stands now is inapplicable to other offences that carry mandatory sentences other than the offence of murder under Section 204 of the Penal Code.
197. The Supreme Court held as follows: -
- It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.



To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. *Muruatetu* as it now stands cannot directly be applicable to those cases.

.....

“Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

The decision of *Muruatetu* and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;

ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in *Muruatetu*;

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

.....

198. Moreover, in *James Kariuki Wagana v Republic* [2018] eKLR, it was observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. It was further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. The court noted that while force had been used in the case before him, it could not be said that the Appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery. The Appellant’s sentence of death was therefore reduced to imprisonment for fifteen years, from the date of conviction.
199. In *Francis Matu Mwangi v Republic* [2019] eKLR, the court upheld the death penalty in respect to robbery with violence.
200. On considering all the evidence and the relevant factors relating to the sentence including the harrowing impact of the incident on the victim(s), the blatant loss of life that was occasioned, the fact that The Appellant in the company of others, robbed the complainant, and in the course of the robbery, the Appellant not only used force, but was armed with a dangerous weapon which resulted to the death of the complainant’s husband and if the same was not enough, the Appellant raped the complainant. The level of violence unleashed on the complainant and her family and the long-term impact of the same was gravely significant to warrant the sentence meted.
201. Accordingly, it has not been disclosed that the trial court overlooked any material factor or considered some wrong or irrelevant factors, or acted on a wrong principle in imposing the sentence. Consequently, I find no reason to interfere with the sentence meted upon the Appellant by the trial court. Therefore, the sentence passed by the trial court is upheld and that the Appellant shall continue to serve the same in accordance with the law.

In the result the appeal is found to lack merit. Thus, the court makes the following orders;

- i. The same is dismissed.



ii. The conviction and sentence by the trial court is upheld.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.**

.....

**CHARLES KARIUKI**

**JUDGE**

