



**Muriungi v Republic (Criminal Appeal 55 of 2019)
[2022] KEHC 13209 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL 55 OF 2019
EM MURIITHI, J
SEPTEMBER 30, 2022**

BETWEEN

JULIUS MURIUNGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. Sogomo G PM
in Tigania Law Court in criminal case No. 753 of 2016 delivered on 15/2/2019)*

JUDGMENT

1. The appellant herein was charged with robbery with violence contrary to section 296(2) of the [Penal Code](#). It was alleged that on the 24th day of March 2015 at Kadebene area of Buuri location in Tigania East sub-county within the Meru County, jointly with another not before court while armed with dangerous weapons namely rifles did rob Stephen Kaniu Baikiba of his mobile phone make Wiko valued at kshs. 3,000/= and immediately at the time of such robbery used actual violence to the said Stephen Kaniu Baikiba.
2. He faced an alternative charge of handling stolen goods contrary to section 322(1) (2) of the [Penal Code](#). It was alleged that on the same date and place, he, otherwise than in the course of stealing, handled one mobile phone make Wiko knowing or having reason to believe them to be stolen goods.
3. He faced a second charge of Robbery with Violence Contrary to Section 296 (2) of the [Penal Code](#). It was alleged that on the same day and place, jointly with another not before court while armed with dangerous weapons namely rifles did rob TT of kshs. 200/= and immediately at the time of such robbery used actual violence to the said TT.
4. He faced a third charge of Gang Rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on the same day and place, in association with another not before court, he intentionally and unlawfully caused his penis to penetrate the vagina of TT without her consent.



5. He faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006. It was alleged that on the said date and place, he intentionally touched the vagina of TT with his penis against her will.
6. He faced a fourth charge of Robbery with Violence Contrary to Section 296 (2) of the *Penal Code*. It was alleged that on the same day and place, jointly with another not before court while armed with dangerous weapons namely rifles did rob CG of her mobile phone make Nokia valued at kshs. 1,000 and cash Ksh.200 and immediately at the time of such robbery used actual violence to the said CG.
7. He faced a fifth charge of Robbery with Violence Contrary to Section 296 (2) of the *Penal Code*. It was alleged that on the same day and place, jointly with another not before court while armed with dangerous weapons namely rifles did rob MK of her mobile phone make Oking valued at kshs. 2,000 and cash kshs 300 and immediately at the time of such robbery used actual violence to the said MK.
8. He faced an alternative charge of handling stolen goods contrary to section 322(1) (2) of the *Penal Code*. It was alleged that on the same date and place, he, otherwise than in the course of stealing, handled one mobile phone make Oking knowing or having reason to believe it to be stolen goods.
9. He also faced a sixth charge of rape contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act*. It was alleged that on the same date and place, he intentionally and unlawfully caused his penis to penetrate the vagina of MK without her consent.
10. He faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006. It was alleged that on the said date and place, he intentionally touched the vagina of MK with his penis against her will.
11. He faced a seventh charge of Robbery with Violence Contrary to Section 296 (2) of the *Penal Code*. It was alleged that on the same day and place, jointly with another not before court while armed with a dangerous weapons namely rifles did rob MG of her mobile phone make Techno valued at kshs. 2,500/ = and immediately at the time of such robbery used actual violence to the said MG.
12. He denied the charges and upon full trial, he was convicted in respect of Counts 1, 2, 3, 4, 5 and 6. During sentencing the trial court stated that, “The court has had regard to the callous nature in which the Accused and his accomplices terrorized their victims and his refusal to even mitigate. In count I, II, IV and V Accused is sentenced to serve Fifty (50) years imprisonment to run concurrently with hard labour. In count III the Accused shall serve another Fifty (50) years while in count VI he shall serve Thirty (30) years to run concurrently with the rest of the other sentences.”

Duty of Appellate Court

13. The duty of this court as the first appellate court was succinctly summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates v. John Patrick Machira & Company Advocates*, [2013] eKLR, as the duty requiring the court to: “..... re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.” In criminal cases, the well known *Okeno v. R* (1972) EA 32 has similar effect.

Evidence

14. PW1, TT, in her sworn testimony stated that, “On 24th March, 2016 I recall that it was about 4:00 p.m and I was in my farm at Kadebene. I was with my husband JK and a man who is a neighbour by the name Kaniu. At the time I saw 3 people rushing towards where we were. Each of them was armed with a



rifle. They told me to remove my clothes and they ordered my husband to lie down. I tried to plead with the assailants but they insisted that I remove the clothes which I did. After I had removed my clothes that man (pointing at the accused) raped me while I was on the ground. The second gunman took possession of the accused's gun and held it under the other arm. The third gunman held my husband at gunpoint while he was on the ground. After the accused was through with his did, the one who had taken possession of his gun also raped me. They had sex with me without my consent. They demanded for money from me and I gave kshs. 200/= to the second rapist. After that the 3 assailants fled. When they were far I heard the sound of a gunshot. We reported the matter at Muthara police station and I was issued with a P3 form which was filled at Muthara sub county hospital. The document is before the court. The accused was unknown to me prior to the day of incident. I identified him after he was arrested at Muthara police station. The entire event of raping me took a few minutes.”

15. On cross examination, she stated that, “I got to know you on the day you raped me.”
16. PW2, Stephen Kaniu Bathiba gave sworn testimony that, “On 24th March 2016 I recall that I was at my farm in Reenu at around 4:00 p.m tilling the land when I saw 3 youths. They were each armed with a rifle. They told me to say my final prayers and demanded for money. They searched my trouser pocket and fished out my cell phone make Wiko that my children had bought for me. After robbing me the gang went to the neighboring farm belonging to JK and ordered him to lie down. Then took his wife TT aside to a bushy area. TT later said that she had been assaulted and robbed off kshs. 200/= . As the thugs were leaving they shot thrice in the air. I reported the incident to police at Kadebene police station the following morning. I saw that person (pointing at the accused) at Kadebene police camp inside a police vehicle. He was among the criminals who attacked my neighbours and I. He is in fact the one who removed the cell phone from my pocket. He was unknown to me prior to the attack. I recovered my cell phone from the police at Kadebene /Muthara after the accused had been arrested. The cell phone is before court. The cell phone was recovered minus the SIM card.”
17. PW3, JK gave sworn testimony that, “On 24th March, 2016 I recall that I was at Kadebene tilling my land and when at around 4.00P.M. 3 people confronted me. I was with my wife TT at the time. The 3 intruders each had a gun. They told us to say our final prayers. One of them pointing a gun at and ordered me to lie down which I did. He told me to throw my machet away which I did. They took TT away into the cultivated garden as one remained behind holding me at gun point. A while later my wife returned and told me that the thugs had ordered her to remove all her clothes. She was crying at the time. My wife told me that after removing her clothes the 2 criminals had raped her. Out of the 3 thugs one of them is before court and is seated there (pointing at the accused). He is the one of the 2 that took away my wife and raped her. The accused and his colleague also robbed my wife kshs. 200/= after raping her. As they fled I overheard a gunshot ring out. My wife went to Muthara police station to report the incident. On 25th March, 2016 we went to Kadebene police camp and found the accused having already been arrested. He was someone unknown to me prior to the incident.”
18. PW4, CG gave sworn testimony that, “On 24th March, 2016 I recall I had been hired as a farmhand at Kadebene and as I was harvesting maize in Ikolomi's farm at around 4:30 pm I heard a voice demanding that everybody sits down. The intruders who were armed with a rifle shot twice in the air. Together with other hired hands we prostrated ourselves. The intruders demanded for our cell phones. I had my cell phone in the bush. The others surrendered their cell phones to the criminals and I heard them say that our end had arrived. The thugs shot twice again saying they had no business with Merus. They demanded that all women lie on their bellies so that they may sodomise us. We were 4 women and 2 men in the land at the time. We pleaded with the thugs not to molest us and they moved a couple of meters away warning that we should not look at them. The thugs demanded that we release the young women to them. They took away 2 young girls, Martha and Kendi. After they were through with the



young women the criminals shot in the air again before escaping. Martha and Kendi told us that the criminals had raped them and then gone to waylay the lorry that was to come and collect us from the farm. Mureithi who was with us called the driver of the lorry and alerted him of the ambush. We walked in the bush up to the tarmac at Kadebene where the lorry was waiting for us. The lorry took us to Ngundune police station but then we were referred to Muthara police station where we reported the matter. I was injured on the leg where the thugs had hit me with the rifle. The police referred us to the Miathene hospital where we were treated and examined. Later, we collected the P3 forms and took them at Muthara hospital. Mine is before court. The assailants were unknown to us. However, one of the women that had been attacked managed to identify one of the young men who had attacked us. We were summoned to Muthara police station and I saw one of the attackers. He was a young man who wore a white shorts during the attack. I was taken to an identification parade at Ngundune police station where I managed to identify the young man as the second in the line up group of 15 men. I picked him up by pointing at him. The person I identified is the one who just turned violent in the dock and had to be sent back to the court holding cells. He is the one who returned to demand that we surrender the young women who were raped. My cell phone was not stolen because I had hidden it in the bush. I later gave it to Sebeline who had hired me.”

19. PW5, Geoffrey Muthomi Murithi a clinician at Miathene sub county hospital produced the P3 form for PW7 aged 22 years who had a history of assault and rape by 2 people. On examination, the patient had tenderness on both cheeks and her face was tender, the majora and minora were intact and her hymen was torn with inflammation on the majora. Urine analysis was done that revealed red blood cells, and he concluded that the patient had been raped. He also produced another P3 form for PW4 aged 66 years who had a history of assault and rape by 2 people. Upon examination this patient had tenderness on back and pelvis, her left hand was swollen and tender. The injuries were days old inflicted by a blunt object and the degree of injury was harm.
20. PW6, Kenneth Kimathi a clinician at Muthara sub county hospital produced the P3 form for PW1 together with the treatment notes. At the time of examination, the patient’s vagina was intact with no bruises on labia majora or minor or cervix. A high vaginal swabs revealed pus cells but no isolated spermatozoa. Based on the foregoing, the clinician opined that the patient had been raped.
21. PW7, MK gave sworn testimony that, “I recall that on 23rd March, 2016 I left home at Karama and accompanied by S, G and G at around 4:00 p.m and went to Kianjai where we spent the night at Ikolomis home and the following morning we proceeded to the latter’s farm in Kadebene to harvest her maize crop. After finishing the task we sat down at around 6:00 pm to await transport back home and that is when 2 individuals emerged from the bush each armed with a rifle. As we sought to flee the scene the intruders shot in the air and demanded that we prostrate ourselves on the ground which we did. As we lay on the ground the men hit us with the butts of their rifles and demanded that we surrender our cell phones and money. One of the gunmen frisked my skirt pocket and removed kshs. 3,000/= and a cell phone make Oking worth kshs. 2,000/=. The gunmen also robbed my colleagues of money and cell phones before ordering us to line up so that they shoot us. We pleaded with the gunmen to spare our lives and that is when they ordered my colleagues to hand over Gatwiri and myself. The thugs then forced Gatwiri and I into a bush and rape us. I was raped by both of them. When they finished raping us they shot in the air and ordered us to leave immediately. We went to where our colleagues were and boarded the lorry that had come to pick us. We proceeded to Miathene police station to report the incident. I was issued with a P3 form by the police and the document was filled at Miathene hospital, I can see it before court. From the hospital, I returned home and the following day I was informed that a suspect had been arrested. I later went to Tigania police station to identify the suspect. He is the one who was at the dock moments ago before walking back into the cell. Picked out the suspect from a group of other men and touched him at the shoulder. I was informed that my cell phone was



recovered. It is the one before court (Referring at accused). It was still light when the thugs attacked us. The accused was more vicious of the 2 and he is one who hit me with the gun butt. He is also the one who raped me first before the other colleagues did the same.”

22. PW8, Joshua Ngarichia the Assistant chief Nturingwi sub location, Ngaramara location testified on oath that, “On 24th March, 2016 at 18.30 hours I received a cell phone call from one of my village elders Kaindio who informed me that 2 gunmen had been seen heading towards Kadebene from Muriri’s direction. About 30 minutes later Kaindio called to inform me that some women had been raped and I alerted administration police officers at Kadebene. I learnt that the suspects were herdsmen and I therefore called the subarea chairman of Mweronkoro to investigate further since the herdsmen had set up a boma in his area. The subarea chairman one Kathurima called me the following morning and informed me that he had apprehended the suspect behind the crime. I proceeded to Mweronkoro and found Julius Muriungi having already been apprehended. His accomplice Kandiri had gone into hiding. I escorted Julius to the local administration police camp. Julius was in possession of 2 cell phones and I handed over the gadgets alongside the suspect at the police camp. One of the rape victims, T T came to the police camp and positively identified Julius as one of her tormentors. Julius is seated there (pointing at the accused). I knew him quite well as he hails from Ringwi area within my jurisdiction. I have known him since he was a child. The cell phones I found Julius with are before court.”
23. PW9 Sgt Margart Muthui of Kilimani DCI office and formerly at Tigania East DCI office, produced P3 forms for PW1, PW7, the cell phones and the identification parade forms as exhibits in court. She testified on oath that, “I do recall that on 25th March 2016 I was in the office when I received a report that on 24th March, 2016 there had been a robbery incident that occurred within Kadebene area as from 4:00 p.m to 6:00 p.m. There were several victims the crime having been a series of events. The first complainant was Stephen Kaniu Bakiba stated that he was in his farm at the said area at 4:00 pm when 3 men 2 who were armed with rifles accosted him and demanded that he surrenders all his valuables in addition to saying a last prayer. One of the thugs hit Stephen with the rifle and ransacked his pockets removing a cell phone make WIKO worth kshs. 3,000/=. The thugs then advanced to an adjacent farm belonging to TT who was in company of her husband JK . The 3 men ordered T and J to surrender all their valuables and ordered TT at gun point to lie down and remove her clothes. One of the robbers raped TT at gun point and when he was through a second one also raped her. They robbed her of kshs. 200/= which was tied to her wrap around. The criminals then left TT’s land. Stephen went to TT’s farm and explained to her and her husband that he had also been robbed by the same thugs. The thugs proceeded to a nearby farm and found 2 women and a man. The 3 women were MK, MG and CG and the man was Nicholas Murithi. They were seated down after the day’s harvest waiting for a vehicle to come and pick them when the robbers showed up at around 6:00 pm. The thugs shot in the air and ordered the 4 to lie down. They frisked them and took a cell phone make Oking valued kshs. 2,000/= belonging to MK together with her kshs. 300/=. MK and MG were dragged by the robbers into a nearby thicket where they were both gang raped. Cecilia was also robbed of her Nokia cell phone valued at kshs. 1,000/= and kshs. 200/= cash. Nicholas was robbed kshs. 200/= fished out of his pockets by the thugs who then shot in the air as they fled. Later the vehicle the 4 had been waiting for arrived and took them to Kadebene administration police camp where the incident was reported. On 25th March, 2016 the assistant chief Joshua Nkarichia called to inform me that one of the suspects had been arrested and that 2 cell phones had been recovered from him. All the women who had been gang raped had been brought to our station to report the incident and had been referred to hospital for examination and treatment. The suspect Julius Muriungi was presented to me by the assistant chief alongside the 2 cell phone make Oking and Wiko which were positively identified by MK and Stephen respectively as belonging to them. On 28th March, 2016 an identification parade was



conducted at Ngundune police station by IP Omondi where CG, MG, MK and Nicholas Muriithi positively identified Julius Muriungi as having been one of the criminals who had attacked, robbed and raped them. I issued P3 forms to the women TT CG, MG and MK which were all filled in hospital. 2 cell phones recovered from the suspects are also before court. Identification parade forms were prepared showing that 4 of the complaints had positively identified the suspect. The duly completed forms are before court. After recording witnesses statements I charged the suspect with the instant case. The suspect is the one who was in the dock but walked back to the cells a while ago.”

24. When put on his defence, the appellant stated that, “I shall remain silent.”

The appeal

25. On appeal, the appellant, in his handwritten amended memorandum of appeal raised 4 grounds as follows:

- a. That the trial court erred in law and fact when it based his conviction on identification, which had not been proved.
- b. That the trial court erred in law and fact when it failed to find that the prosecution witnesses adduced contradictory and doubtful evidence.
- c. The trial court erred in law and fact when it failed to find that clinical evidence was not proved, as D.N.A analysis was not conducted.
- d. The trial court erred in law and fact when it failed to find that the prosecution did not prove its case beyond reasonable doubt.

Submissions

26. The appeal was canvassed by way of written submissions, which were filed only by the appellant. He urged that since none of the prosecution witnesses either identified him during the incident or give his description the police, identification was not proved. He alluded to various inconsistencies in the prosecution’s case and he submitted that since the gun he was allegedly armed with was never recovered, the case was not proved beyond reasonable doubts. He urged the court to order a retrial since his rights to fair trial were violated, as he was not allowed to cross examine the prosecution witnesses or call his own witnesses.

Analysis and Determination

27. From the grounds of appeal as framed, the only issue for determination is whether the prosecution proved the offences beyond reasonable doubt with consistent evidence.
28. There is no dispute that PW1, PW2 and PW7 were robbed on the material day while PW1 and PW7 were also gang raped. What is in dispute is whether the appellant was positively identified as the perpetrator.

Robbery with violence

29. For robbery with violence, the prosecution needed to prove beyond reasonable doubt the following elements as stipulated under section 296(2) of the Penal Code: - “(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”



30. PW1, PW2, PW3, PW4 and PW7 all testified that the appellant was in the company of others and they were armed with rifles. PW4 stated that she was hit on the leg with a rifle by the assailants. PW8 and PW9 stated that the appellant was found in possession of the stolen phones belonging to PW2 and PW7. PW4 stated that her phone was not stolen as she had hidden it in the bush.
31. PW1 was with her husband PW3 and PW2 on the material day at around 4.00 pm when she saw 3 people rushing towards them. She stated that, "Each of them was armed with a rifleThey demanded for money from me and I gave kshs. 200/= to the second rapist."
32. PW2 was tilling his farm on the material day at around 4.00 pm when he saw 3 youths. He testified that, "They searched my trouser pocket and fished out my cell phone make Wiko that my children had bought for me. After robbing me the gang went to the neighboring farm belonging to JK and ordered him to lie down. Then took his wife TT aside to a bushy area. TT later said that she had been assaulted and robbed off kshs. 200/=."
33. PW3 was with PW1 when 3 people confronted them. He testified that, "The 3 intruders each had a gun..One of them pointing a gun at and ordered me to lie down which I did....They took TT away into the cultivated garden as one remained behind holding me at gun point. A while later my wife returned and told me that the thugs had ordered her to remove all her clothes. She was crying at the time. My wife told me that after removing her clothes the 2 criminals had raped her.....The accused and his colleague also robbed my wife kshs. 200/= after raping her."
34. PW7 was at Ikolomi's farm harvesting maize with S, G and G. They finished harvesting maize and as they sat to await transport back home, 2 people emerged from the bush. "As we lay on the ground the men hit us with the butts of their rifles and demanded that we surrender our cell phones and money. One of the gunmen frisked my skirt pocket and removed kshs. 3,000/= and a cell phone make OKING worth kshs. 2,000/= . The gunmen also robbed my colleagues of money and cell phones before ordering us to line up so that they shoot us."

Doctrine of Recent Possession

35. The essential elements of the doctrine of recent possession were subsumed by the Court of Appeal in *Erick Otieno Arum v R* (2006)eKLR, as follows:- " In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. "
36. PW2 and PW7 positively identified the cell phones found with the appellant, and when the appellant was called upon to provide a reasonable explanation for the possession, he opted to remain silent. In *Paul Mwita Robi v R* (2010) eKLR, the Court of Appeal observed that; "Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden."



37. PW8 testified that, “I proceeded to Mweronkoro and found J Muriungi having already been apprehended....I escorted Julius to the local administration police camp. Julius was in possession of 2 cell phones and I handed over the gadgets alongside the suspect at the police camp....The cell phones I found Julius with are before court.”
38. PW9 testified that, “...On 25th March, 2016 the assistant chief Joshua Nkarichia called to inform me that one of the suspects had been arrested and that 2 cell phones had been recovered from him....The suspect Julius Muriungi was presented to me by the assistant chief alongside the 2 cell phones make Oking and Wiko which were positively identified by MK and Stephen respectively as belonging to them.”
39. I find that based on the evidence led by the prosecution witnesses coupled with the fact that the appellant was found in possession of PW2 and PW7’s cell phones, which were positively identified as the ones stolen from them, the appellant was indeed the perpetrator of the offences of robbery with violence.

Gang Rape and Rape

40. The offence of Gang Rape is provided under Section 10 of the *Sexual Offences Act*, as follows: “Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”
41. Rape is defined under section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a person’s genital organ into another’s genital organ without their consent. In *R v Oyier* (1985) KLR pg 353, the Court of Appeal held as follows:- “The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
42. PW1 narrated that, “After I had removed my clothes that man (pointing at the accused) raped me while I was on the ground...After the accused was through with his did, the one who had taken possession of his gun also raped me. They had sex with me without my consent. The entire event of raping me took a few minutes.”
43. PW7 stated that, “The thugs then forced Gatwiri and I into a bush and raped us. I was raped by both of them.”
44. PW1 and PW7’s testimonies were corroborated by PW2, PW3, PW5 and PW6. When PW5 examined PW7, she had tenderness on both cheeks and her face was tender, the majora and minora were intact and her hymen was torn with inflammation on the majora. Urine analysis was done that revealed red blood cells, and he concluded that she had been raped. When PW6 examined PW1, her vagina was intact with no bruises on labia majora or minor or cervix. A high vaginal swabs revealed pus cells but no isolated spermatozoa.



45. Accordingly, the prosecution proved that, there was intentional and unlawful penetration of PW1 and PW7’s genital organs, without their consent.

Identification of the appellant

46. PW1 identified the appellant after he was arrested. PW2 stated that the appellant, who was among the people who attacked him and his neighbours, was the person who removed his cell phone from his pocket. PW3 stated that the appellant was the one who took his wife, PW1 and raped her. PW4 and PW7 identified the appellant in an Identification Parade. PW8 stated that PW1 positively identified the appellant as one of the assailants. He added that he knew the appellant well prior to the incident, as he hailed from his jurisdiction. The offences herein were committed during the day and there was no margin of error and/or mistaken identity. This court finds that the appellant was positively identified as the perpetrator of the offences herein by the consistent, well corroborated and water tight testimonies of the prosecution witnesses.
47. The appellant in his submissions has alleged violation of his right to fair trial as he was not allowed to cross examine the witnesses or call his own. The appellant was properly called upon to proffer his defence but he opted to remain silent. The record is clear that the appellant turned violent and walked back to the court holding cells on numerous occasions, and the trial court had no option but to proceed with the matter in his absence. Article 50 (2) (f) provides that: “Every accused person has the right to a fair trial, which includes the right to be present when being tried unless the conduct of the accused person makes it impossible for the fair trial to proceed.”
48. This Court finds that since the appellant deliberately absented himself, he had waived his right to be present during trial and/or cross examine the prosecution witnesses. That position was taken in the Ugandan case of *Uganda v Gulindwa Paul and Tumusiime* HCT-00-AC-CM-005-2015 that was quoted in *Republic v Galma Abagaro Shano* [2017] eKLR where the court stated as follows:

“ [A] defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by *constitution*, [can] turn around and say he has lost the benefits he might have expected to enjoy had he exercised it.”

49. Similarly, Mutuku, J. in *Republic v Galma Abagaro Shano* [2017] eKLR (*Supra*), observed that:

“ [T]he accused’s conduct that may deny him the enjoyments of the right to be present in court during his trial include situations where for instance the accused person becomes violent or unruly during proceedings to such an extent that it becomes impossible for the court to conduct the proceedings or where he deliberately absents himself or absconds.”

Orders

50. In the circumstances, the court finds that the appellant cannot claim violation of his rights to a fair trial as enshrined under Article 50(2) (f) (k) of the *Constitution*, which right he chose not to exercise by absenting himself and going back to the cells during the proceedings in his trial. The Court further finds that the prosecution evidence proved the commission by the appellant of the main offences charged respectively under sections 296(2) of the *Penal Code*, section 10 of the *Sexual Offences Act* and section



3(1) of the *Sexual Offences Act*. Indeed, Count No. 6 should also have been an offence of gang rape rather than ordinary rape as the victim PW7 clearly testified that she was raped by both her attackers.

51. Accordingly, this Court finds the entire appeal to lack merits and it is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person

Ms. Nandwa for DPP

