REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 46 OF 2019

WYCLIFFE MUGENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. ML Nabibya, Senior Resident Magistrate (SRM) delivered on the 11th July 2018 in Hamisi SRMCCRC No. 695 of 2017 and Hamisi SRMCSO No. 51 of 2017)

JUDGMENT

1. The appellant herein has proffered this appeal challenging his conviction and sentencing in Hamisi SRMCCRC No. 695 of 2017, of the offense of robbery with violence, contrary to section 295, as read with section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and in Hamisi SRMCCRC No. 695 of 2017 of gang rape, contrary to section 10 of the Sexual Offences Act, No. 3 of 2016.

2. The duty of a first appellate court was stated by the Court of Appeal, in *Gabriel Kamau Njoroge vs. Republic* (1987) eKLR (Platt, Apaloo JJA & Masime Ag JA), in the following words:

> *" ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."*

3. The facts of the case, as presented at the trial court, are that on the night of the 21st/22nd November 2017, PW1 and PW2 were sleeping, together with two small children, when people broke into their house, tied up their hands and then raped them. They ransacked the house and took away assorted items, which included an identity card, ATM card, mobile phones, *Kitenge* material, wheat flour, bar soap, tea leaves CD compact disc, foodstuffs, money, among others. They asked for details of the mobile phones pins and MPesa pins, which PW1and PW2 gave them, after cutlasses were placed on their necks. After they left, PW1 and PW2 proceeded to their parents' house, where they explained their ordeal, before they proceeded to make a report at the Chavakali Police Station. They were treated at Mbale. They recorded statements and were issued with P3 forms. PW1 stated that there was no other light other than the torch directed at her, and she did not recognize anyone because her eyes were covered. PW2 also did not identify anyone, because she had been ordered to cover herself. One of the children testified, PW3, giving an unsworn statement. He detailed what he saw the intruders do, including food meant for the baby. He stated that he identified the appellant, seated at a door, carrying a bag filled with the stuff stolen from the house. He stated that the appellant had his head covered, but he removed the muffin in order to speak, and it was then that he identified him. PW4 acted on information from an informer, which led him to arrest the appellant at a house in Cheptulu. They recovered the phone belonging to PW2 and other assorted items. The appellant told them that he was a tenant at the house where they found him, although they did not confirm that with the landlord. He stated that when an inventory of what was recovered was prepared, the appellant was not present. PW5 was the investigating officer. He visited the scene of the crime, recorded statements from the witnesses, and collected the items recovered. He also oversaw recovery of a *kitenge dress*, Exe flour, bar soap, tea leaves, among other items. He produced the items as exhibits, which he said were not linked by anyone to the appellant. PW6 was the clinical officer who attended to PW1 and PW2. The two were emotionally unstable when he attended to them. After examining them, he found that they had recently had forcible penetrative sex, based on the physical injuries on their vaginas. The age of injury was documented as 4½ hours old. He produced the relevant medical evidence to support his testimony.

4. The appellant was put on his defence. He gave a sworn statement. He denied the charges. He said that he did not know what happened on the material day, but gave details on what transpired on the day of his arrest on 22nd November 2017. He said that he did not know the owner of the house from where he was arrested. He asserted that he was assaulted before he recorded his statement.

5. At the end of the trial, the trial court evaluated the evidence, and was satisfied that the offences charged in all the four counts had been proved to the required standard, convicted the appellant, and sentenced him to 15 years for Counts I and II, and 20 years for Counts III and IV, respectively, to be served concurrently.

6. The appellant was aggrieved by the conviction and sentence, and proffered the instant appeal, raising several grounds of appeal. He avers that the prosecution did not call essential witnesses and that he was not subjected to medical examination. Further grounds of appeal were filed, where he argued that the charge sheet was defective and did not support the evidence on record, his constitutional rights under Article 49(f)(i)(ii) were violates, the prosecution case was inconsistent inaccurate contradictory and uncorroborated to extent that it could not support a conviction, crucial witnesses were not presented, and that he was not subjected to a fair trial as required by the Constitution.

7. The appellant put in written submissions in support of his case. The respondent had indicated, on 30th July 2020, that it would put in written submissions, but on 6th October 2020 stated that it would not file any.

8. In his written submissions, the appellant raised several grounds. The first ground is on what he calls the defective charge, and turns largely around the statement in the charge sheet to effect that he was arraigned in court on 29th November 2017, when in fact the arraignment was on 30th November 2017. His second ground is on alleged violation of fair trial rights under Article 49 of the Constitution. He avers that he was arrested on 24th November 2017, but was not presented in court until 29th July 2017, according to the charge sheet, and 30th November 2017, according to the court file. He avers that Article 27 of the Constitution was violated, as he was not afforded equal treatment, benefit and protection. Ground three centres around recovery of the mobile phone. He avers that he was convicted on the basis of recent possession of the stolen phone, yet there was no evidence that the same belonged to PW2. He avers that the receipt produced as evidence was dated after the robbery incident. Ground four is on vital evidence not being produced. He argues that the owner of the property from where he was arrested ought to have been called, to confirm his tenancy at the said property. Scenes of crime personnel were also not called, despite them visiting the scene, and taking photographs. He also states that the inventory prepared by the police was not produced. Ground five is about the unfairness of the trial. He avers that he ought to have been charged with handling stolen property and not robbery with violence. Secondly, he argues that PW3 did not make a court identification of the person that he saw at the scene of the crime, as the witness said that the person he saw at the scene was not in court. He also states that the description given by PW3, of the offender, did not fit him. He also argues that section 211 of the Criminal Procedure Code, Cap 75 laws of kenya, was not complied with. He also argues that there was no evidence that linked him to the gang rape, so he ought not have been convicted of the same.

9. I will start with the issue of the charge being defective, because it states that the date of arraignment was 29th November 2017, while the court records indicates that the appellant was presented in court for plea taking on 30th November 2017. I have looked at both records. On the face of the charge sheet, it is typed that the date of report to court was 29th November 2017. Then there are two handwritten records of 30th November 2017, one in the middle of the document, and the other at the bottom, both countersigned by the person who endorsed the dates. It is not clear to me what the endorsement was for. Both the handwritten and typed proceedings of the trial court indicate that the appellant was presented in court for the first time on 30th November 2017, and that was when he took plea. 30th November 2017 is the date when the appellant was presented in court and took plea, and not 29th November 2017. However, that does not go to the heart of the charge, and whether he was taken to court on 29th November 2017 or 30th November 2017 is neither here nor there, for the same cannot be a basis for impugning the proceedings that were subsequently conducted.

10. Next is with regard to violation of Article 49 of the Constitution. His case is that he was taken to court more than 24 hours after his arrest, and that no explanation was given for the delay in presenting him in court outside the timeline. The charge sheet indicates that the appellant was arrested on 24th November 2017. It is not clear from the testimonies of the police officers who arrested the appellant and investigated the complaint as to when he was arrested. PW4 vaguely talked of 23rd November 2017, raiding some place, collecting some items, and a suspect signing an inventory. He did not say that a suspect was arrested. He then said the unidentified suspect was taken to court on 24th November 2017 over a different case of robbery with violence. He talked of two individuals, a Philip and the appellant. He said Philip led him to the house, where he found the appellant. He did not state whether he arrested anyone on that day, neither Philip nor the appellant. PW6, the investigating did not talk about the arrest of anyone. He talked of some items being "arrested" on 23rd November 2017. Other than what is in the charge sheet, there is no clear evidence as to when the appellant was arrested.

11. The trial record indicates that the appellant was presented in court on 30th November 2017. If his arrest was 24th November 2017, it would mean that he was presented in court after 4 days, and if it was 23rd November 2017, then there was a delay of 7 days before presentation in court. Obviously there was a breach of Article 49 of the Constitution. That provision makes it a violation where no explanation is given for the delay. That explanation ought to be rendered for the benefit of the accused person, so that he can understand why the State has had to violate his rights under Article 49. There is a duty on the part of the court to ask for those explanations, when it is clear from the charge sheet that the arraignment was happening outside the 24-hour timeline. The explanation ought to be given at the time the accused is first presented in court for plea. It behooves the State to give such explanation, without having to wait for the court to ask for it, as it would be the State that has violated Article 49 of the Constitution, and it ought to account for the violation. Indeed, where the State, for some good reason, has to hold a suspect beyond the 24 hours allowed in law, it ought to present him in court, and seek for leave of court to hold the suspect in abrogation of Article 49.

12. From the record before me, no explanation was offered on 30th November 2017, when the appellant was presented for plea. It is not clear whether the court ever enquired as to why the appellant was being produced in court 6 or 7 days after his arrest. There is also no evidence that the court had granted permission for the appellant was be held in custody for more than 24 hours before his presentation in court. The conclusion to draw, therefore, is that there was a violation of the rights of the appellant under Article 49 of the Constitution, and his treatment violated Article 27 of the Constitution, with respect to being entitled to equal protection and benefit of the law.

13. Is a violation of the 24-hour rule fatal to the prosecution's case? Article 49 of the Constitution articulates the rights of an arrested person. These are rights which accrue to a person who has been arrested, before presentation in court. Article 50 states the rights accruing with respect to a fair hearing. The two sets of rights ought to be distinguished. The rights under 49 are strictly with respect to arrest prior to presentation in court. The rights under Article 50 relate to what an arrested person is entitled to once he has been presented in court for trial or hearing. A violation of the rights in Article 50 could have a profound effect to criminal proceedings, for they touch on rights during trial. The rights under 49 have really little to do with trial, and their violation should have no impact on the integrity of the trial. It is conceded that violation of the rights under Article 49 of the Constitution, is a bad beginning for the criminal matter, but the same does not affect the viability of the process. What it ought to attract are civil sanctions, by way of compensation or damages for false imprisonment. The fact,

therefore, that the appellant was presented in court 6 or 7 days after his arrest, in clear violation of Article 49, has no effect whatsoever on the criminal proceedings that were conducted against him and their outcome.

14. Regarding contradictions, the appellant has raised several issues. One relates to the fact that he was convicted on the basis of the doctrine of recent possession, on account of his being found in possession of a phone, allegedly belonging to PW2. He submits that there was no proof that the phone belonged to or was owned by PW2. The evidence of ownership placed on record, is a receipt dated 24th November 2017, produced by PW2. She explained that the original receipt was taken away by the robbers, and that she went back to the shop where she had bought the mobile phone and was issued with a duplicate receipt, bearing the date when she went back. A receipt bearing a date different from that on the original receipt cannot possibly be a duplicate of the original. A duplicate is a copy of the original, if it is not then it cannot be a duplicate. The prosecution is bound to prove its case beyond reasonable doubt. It was obliged to establish ownership of the mobile phone beyond reasonable doubt. I am not persuaded that PW2 provided adequate evidence of ownership of the phone in question, by availing in court a receipt of payment bearing a date after the occurrence of the alleged theft or robbery. It might have helped to call the phone seller or dealer as a witness to lend credence to the evidence of PW2, that he had previously sold the phone to her, before 24th November 2017, and that she came back to him on 24th November 2017 asking for a duplicate receipt, and that he did give to her another receipt. He should have explained why he was unable to provide evidence of payment for the phone on the date it was bought, and issued PW2 with a "duplicate" receipt bearing a date after the date of the alleged theft. The fact that the evidence of payment for the phone indicated a date after the incident, should have raised eyebrows. PW2 was not the maker of the receipt, the maker of that receipt ought to have been called to vouch for its authenticity, otherwise it would appear the same was generated to suit the case of the prosecution. Without a proper receipt connecting her to the said phone, it cannot be said that the prosecution proved that the phone was stolen from PW2. I agree with the appellant that was not evidence upon which the trial court could convict.

15. The other submission is that crucial or vital evidence was not adduced or produced. He talks of the owner of the property where he was allegedly arrested from and the items allegedly recovered thereafter. He also talks of scenes of crime personnel who visited the scene and took pictures. He also talks about the inventory that PW4 alleged was prepared, but which was not produced in court.

16. It could be said that one aspect of that submission related to failure to call crucial witnesses. The courts have said it is a principle of law that there is no required number of witnesses to testify in criminal matters. That position is stated in section 143 of the Evidence Act, Cap 80, Laws of Kenya, and it has been restated and repeated in many cases. In *Keter vs. Republic* [2006] eKLR *(Musinga & KimaruJJ), Donald Majiwa Achilwa and 2 others vs. Republic* [2009] eKLR (Bosire, Waki and Onyango Otieno JJA) and *Republic vs. George Onyango Anyang & another* [2016] eKLR (Makau J), it was said that the prosecution must call such number of witnesses as are sufficient to establish the charge beyond reasonable doubt. That position ought to be taken together with the caution made in *Bukenya & Others vs. Uganda* [1972] EA 549(*Spry Ag. P, Lutta Ag VP & Mustafa JA*), that where the evidence called was barely adequate, the court may infer that the evidence of the uncalled witnesses would have been adverse to the prosecution.

17. There is no obligation on the prosecution to call every person who knows something or other about the matter in dispute. The duty is to call such number of witnesses as are adequate to establish the case against the accused. There is no required or standard number. However, much as the prosecution is at liberty to call such number of witnesses as it believes are enough to establish a case against the accused, it must ensure that all the ends are tied up, by calling the witnesses whose evidence close any gaps. There should be no loss of sight of the fact the standard of proof in criminal cases is very high, proof beyond reasonable doubt. The prosecution ought to call witnesses who would adduce evidence to bring the matter to the required threshold.

18. With regard to this case, I have already discussed the issue of PW2 producing what was described as a duplicate receipt as evidence of payment for the mobile phone set that was allegedly stolen from her. She did not have the original receipt. She said it was taken away by the robbers, and when she went to the shop where she had bought the phone, she was issued with a receipt bearing, not the date when she bought the phone, but of the date when she went for the duplicate receipt. Such a receipt would not very useful. It was made after the event of the robbery. The explanation of PW2 was not adequate, the person who generated the receipt ought to have been called to explain why he was not able to generate a duplicate receipt bearing the date when he sold the phone, as opposed to one bearing the date when PW2 approached him for the duplicate. The document that PW2 was relying on, was not evidence that she had bought the phone prior to the incident, but proof that she acquired the phone after the incident, and only the maker of the receipt could have authenticated what was obviously a flawed document. The trial court ought not have relied on the same without the evidence of the witness that was not called, the maker of the receipt dated 24th November 2017.

19. The appellant has raised the issue of the person he calls the landlord of the premises where he was allegedly arrested from, and where the items were recovered from. Where a criminal matter is founded on the doctrine of possession of stolen items, such as in this case, it is crucial that it ought to be established that the place where the items alleged to have been stolen were recovered is connected to the accused persons. To establish possession, it must be shown that the premises where the items were recovered from was the accused person's place of abode, or a place under his control, so that one can say that any items found in that place or those premises must have been brought there by him, or with his knowledge, or consent, or were under his control or custody.

20. The evidence as to where the items were recovered from is incredibly hazy. PW4 described himself as the arresting officer. He is the one who visited the house where the recovery was allegedly done, and the where the appellant was allegedly arrested. The testimony of PW4 was quite vague. He is recorded to have said:

> *"DCI hamisi, Serem police station. On 23/11/17 at around 1 PM we had an informer, was looking for Philip Ong'anyi. We went to Cheptulu patrol base with colleagues the suspect was a neighbour to the police base, we went to the house where we found amongst other items, a Neon black mobile phone, serial no. 353675078003748, an ID card. Suspect signed the inventory.*
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> *On 24th, he was charged with the offence of robbery with under file 688/17. next day while in office, colleagues from Sabatia came, at that time, the suspect real name was discovered to be Wycliffe Mogedo. Some of the recovered items were shown to officer who identified the Neon phone (PMFI 11) as amongst those they were searching. I recorded statement.*

Cross-examined by Mukabi for accused

I was the arresting officer. He was inside his house. Philip led me to the house. the accused was found in his house. He was then known as Philip Ong'anyi.

A Neon phone and other items were recovered. It's a rental premise. When we took the inventory, Philip wasn't present. I was CPL Victor M Sue, PC Samuel Maina, PC Korir.

There was also Philip, a suspect. He then told us his name was Wycliffe Mogedo. It was around 1 am. He even showed us his identification document.

Accused's ID is not in the inventory. I didn't ask the landlord. I didn't ask in investigations if accused was a tenant. He confirmed to us he was one."

21. I believe that the testimony of PW4 as recorded speaks for itself. My focus is on who the occupant of the house or premises was. Although the same was said to be a rental house, PW4 said that he did not carry out investigations to establish who the tenant was, or who was entitled to occupy the premises. He also did not investigate who the landlord or owner of the house was, so as to verify who the tenant for the premises was. He said that they were looking for a Philip Ong'anyi, and they were led to the premises by a Philip, and they found in the premises the appellant, who was then identified as Philip Ong'anyi. There was also a Philip, who was a suspect, who said his name was Wycliffe Mogedo. That testimony was incredibly convoluted. It is not clear whether that was how PW4 testified, or that was how the testimony was recorded. It is not clear who was who. The witness was looking for a certain Philip Ong'anyi, and he was led to the house by a Philip, and he found the appellant there, the Philip Ong'anyi that they were looking. Then he went on to say that in addition to Philip Ong'anyi, there was also another Philp, who was a suspect, and who said that his name was Wycliffe Mogedo. So how many people were at the scene of the recovery? And had control of the premises? That could only be unraveled by the owner of the premises, who would have led evidence as to the person that he had rented out the premises to, for it would have been such person who would have been called upon to account for the items that were found in that house. The prosecution did not adduce any evidence as to who had control of the house from where those items were recovered. It could be that the appellant was at the scene, but that alone was not adequate to establish that he had control of the premises, so as to be held accountable for whatever was recovered from the premises. To establish the fact beyond doubt, that he controlled those premises, the owner or landlord ought to have been called to attest to the fact, so that point is established beyond doubt.

22. The second issue that the appellant raises relates to scenes of crime personnel, who had allegedly visited the scene of crime. He appears to complain that the police officers who visited the scene did not take photographs or dust the place for fingerprints to connect him to the crime. It is not every case that will require photographs of the scene of crime or fingerprints. For one, there was no damage to the property to require pictorial evidence. There was no allegation that the robbers had shed blood, in respect of which there might have been need to have pictures of the scene. The omission to call scenes of crime personnel, therefore, had no impact on the prosecution case. Such evidence would have added little value to the case, and the omission was not fatal.

23. The third issue is about the inventory. One was prepared by PW4. PW5 alluded to it. However, the same was not put in evidence, instead what was presented were the items recovered at the event when the inventory was allegedly prepared. Was it mandatory to have it produced? No. Preparation of an inventory is not a mandatory requirement of the law, and there is no requirement that where one is prepared it must be presented in evidence. It is a tool used by investigators to aid them in their work. It should be within their discretion to produce it as part of the evidence, and failure to produce it should not be fatal to the prosecution case. See *Stephen Kimani Robe and others vs. Republic* [2013] eKLR (Muchemi, Odunga JJ), *Kimani Kimanjuri and another vs. Republic* [2013] eKLR (Muchemi, Odunga JJ), *Leonard Odhiambo Ouma and another vs. Republic* [2011] eKLR (O'Kubasu, Aganyanya and Nyamu JJA).

24. The final batch of grounds relate to what the appellant calls unfair trial. He submits that if he was found in possession of a stolen mobile phone he ought to have been charged with handling stolen property, contrary to section 322(2) of the Penal Code. He submits that the fact that he was not so charged suggests that he was not found in possession of the alleged mobile phone. He also raises the issue of the receipt again, and the evidence of PW3, who allegedly described the features of the persons he saw at the scene. He also submits that no evidence was presented which connected him to the alleged gang rape.

25. I have dealt with the issue of the receipt, and I will not repeat it. The prosecution should have done more to establish that the mobile phone allegedly found or recovered at the scene where the appellant was arrested belonged to PW2. The receipt produced was obtained days after the event, and it cannot be a basis for conviction unless there was other evidence to establish that although the receipt was issued after the event, the mobile phone had in fact been in possession and control of PW2, so as to associate it with her, in a manner that showed that it could have been stolen from her in the manner alleged. In the absence of such evidence there is a gap. The receipt produced was not adequate as evidence that the phone belonged to PW2.

26. On the question of being charged with handling stolen property, the prosecution has the discretion, where the circumstances disclose several offences, to charge an accused person with any number of offences. Possession can be a basis for charging a suspect with either theft, simple robbery, robbery with violence, handling stolen property or any other related offence. Handling stolen goods is a cognate offence to offences founded on theft or stealing, which include robbery with violence. The prosecution could have charged the appellant with the offence of handling stolen goods as an alternative to the robbery charges, but they chose not to. That, again, is not fatal to the charge. In any event, the court could still convict the appellant, by dint of section 179 of the Criminal Procedure Code, of any of cognate offences disclosed by the evidence adduced. See *Ouma vs. Republic* [1969] EA 398 (Sir Charles Newbold P, Sir Clement de Lestang VP and Spry JA) and *Mwangi Mungai vs. Republic* [2006] eKLR (Omolo, Tunoi and Githinji JJA).

27. On the testimony of PW3, the record is clear that he stated that the person whose features he described to the court was not in court, and, therefore, that could not have been the description of the appellant. What should be of concern regarding PW3, is that he was a minor of eleven (11) years. He cannot be said to have been of tender years, the capping age is ten (10). He had just emerged from tender age. His testimony was unsworn. He was the only eyewitness who claimed to have had identified the appellant at the scene. He did not describe his

features, but said he saw him seated close to a door near a corridor, carrying a bag, he saw his face when he uncovered himself. He identified him on the basis of torch lights. I did not have the benefit of seeing PW3 testify, it was the trial court which had that benefit. However, the testimony of a child of almost tender years, unsworn, requires to be handled with care. The court relied on the evidence of one single identifying witness, whose testimony was unsworn. Secondly, the evidence was not corroborated, and the trial court did not attempt to find any corroboration. The incident happened at 1.00 AM in the night. The question would be whether in the stress of an attack in the dead of the night the circumstances were favourable for identification by a minor. Looked at globally, the trial court ought not have relied on the sole evidence of the minor on identification, when there was no other corroborating evidence.

28. There is ample case law that tender age is usually taken to be age 10 years and below, and that ages 11 and 12 are borderline, so that any child above 12 years would not be considered to be a child of tender years. Whether a child of tender years, and those in the borderline ages, give sworn evidence should be a matter at the discretion of the trial court, guided, as it should, by section 19 of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya. Where such children give unsworn evidence, that evidence must be corroborated. See *Johnson Muiruri vs. Republic* [1983] KLR 445 (Madan, Porter JJA and Chesoni Ag JA) and *John Otieno Oloo vs. Republic* [2009] eKLR (O'Kubasu, Onyango Otieno and Nyamu JJA). No corroboration is required where the same class of children give sworn evidence, but a court ought not convict solely based on that evidence, if uncorroborated, before warning itself of the danger. See *Kibagendi Arap Kolil vs. R* [1959] EA 92 (Forbes VP, Gould and Windham JJA) and *Johnson Muiruri vs. Republic* [1983] KLR 445 (Madan, Porter JJA and Chesoni Ag JA).

29. In this case, PW3 was a child of 11, a borderline case, and the trial court subjected him to *voire dire* examination, concluded that he was intelligent and focused, ruled him to be of tender age, and decided to take his evidence unsworn. That being the case, his unsworn evidence ought to have been corroborated. The trial court had that prime in its mind, the need for corroboration, and found that it had indeed been corroborated, even though it did not state by which other pieces of evidence. The evidence of the minor that required corroboration was the identification of the appellant as one of the perpetrators of the offence. He said that there was light from torches and that he saw the appellant seated somewhere and he removed what he had covered his face with, and he was able, from that action to identify him. To that extent there was corroboration.

30. On the identification, it was that of a single witness. The trial court properly guided itself on the dangers of relying on such evidence, from the decisions in *Kiarie vs. Republic* [1984] KLR 739 (Kneller JA, Chesoni and Nyarangi Ag JA), *Stephen Thama Wanjohi vs. Republic* [2014] eKLR (Kimaru J) and *Maitanyi vs. Republic* [1986] KLR 198 (Nyarangi, Platt and Gachuhi JJA), all of which emphasized on the need to test with the greatest care the evidence of a single witness respecting identification, especially where the conditions favouring a correct identification were difficult. The only light available at the material time appears to have be from torches that the assailants had. No identification was mounted, and, therefore, the appellant was not picked from a parade. The attack happened at the dead of the night, 1 AM. None of the adults identified the appellant. PW3 did not describe any feature on the appellant that led him to pick him out at the dock as the person that the saw seated in the house near the door, wearing a muffin, and carrying a bag, on the material night. The appellant was the only accused person before the trial court, and, therefore, the only person the child witness was asked to identify. The trial court ought to have taken the testimony with some measure of caution. The dock identification of the appellant by the minor ought not have been the sole basis upon which the conviction was based, taking into account that the evidence on the arrest of the appellant and the recovery of the alleged stolen items was rather hazy. See *Simon Keter vs. Republic* [2006] eKLR (Musinga, Kimaru JJ). The other corroborating evidence, the receipt that would have linked the phone allegedly stolen from PW2 to her, and to the appellant, was also not evidence the trial court ought to have relied on to convict. The standard of proof was, to my mind, not met on the matter of the identification of the appellant as one of the assailants.

31. On the gang rape charge, there is no doubt that PW1 and PW2 were sexually molested. But was there basis for convicting the appellant of that offence? The two victim witnesses did not identify the appellant, nor any of the rapists. Given that testimony, the trial court ought not have convicted the appellant. Not all of them raped them. There was reference to a "*mkubwa*," who appeared to be very busy controlling the events, it was not said that he participated in the rapes. There was another who asked for a condom, and when one was not available, said that he could not do it without a condom. If the appellant was present, there is a chance that he was among those who committed the rapes, there is also a chance that he was among those who did not. There is benefit of the doubt.

32. Overall, I am not persuaded that the case presented by the prosecution reached the threshold for conviction of the appellant for robbery with violence and gang rape on all the four counts. He ought not have been convicted. I shall according allow the appeal, quash the convictions, and set aside the sentences imposed. The appellant shall be set free from prison unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF AUGUST2021

W MUSYOKA

JUDGE