REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 80 OF 2019

PN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an a*ppeal from the original conviction and sentence of the Principal Magistrate's Court at Tigania in Criminal Case No. 38 of 2018 delivered on 29th April 2019 by Hon. Sogomo, PM)**

JUDGMENT

1. GK and the Appellant, PN were jointly charged in Tigania Criminal Case No. 38 of 2018 with two counts. Count I was 'Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.' Count II was 'Gang Rape contrary to Section 10 of the Sexual Offences Act.'

2. The particulars of offence for Count I, 'Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code' were as follows: -

> 'On the 14th day of October 2018 at [Particulars withheld] Village, Muthara Location in Tigania East Sub-County, jointly with others not before Court while armed with a dangerous weapon namely a C-line, robbed SM of cash Ksh 18,400/=, of a mobile phone make Tigi, sim card and 32 GB memory card valued at Ksh 25,000/=, and at, or immediately before or immediately after the time of such robbery used actual bodily harm to the said SM.'

3. The particulars of offence for Count II, 'Gang Rape contrary to Section 10 of the Sexual Offences Act' were as follows: -

> 'On the 14th day of October 2018 at [Particulars withheld] Village, Muthara Location in Tigania East Sub-County, within Meru County, jointly with others not before Court intentionally and unlawfully caused their penis, one after the other to penetrate the vagina of SM, a woman aged 39 years without her consent.'

4. They were charged with the alternative count of 'Committing an Indecent Act with an Adult contrary to Section 11 (A) of the Sexual Offences Act.' The particulars of offence were as follows: -

> 'On the 14th day of October 2018 at [Particulars withheld] Village, Muthara Location in Tigania East Sub-County, within Meru County, jointly with others not before Court intentionally touched the vagina of SM, using their penis against her will.'

5. The Appellant and his co-accused pleaded not guilty to all the counts. The matter proceeded to trial and they were placed on their defence. By the Judgment of the Court delivered on 29th April 2019, the trial Court Hon. G. Sogomo, PM convicted both accused persons for Count I and Count II and discharged them for the alternative Count. The 1st accused, GK was sentenced to serve probation for a period of three (3) years and the Appellant was sentenced to serve twenty (20) years imprisonment in each count.

The Appeal

6. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, the Appellant has preferred the instant appeal raising the following grounds of appeal: -

> **i. That, the learned trial magistrate erred in matters of law and fact by failing to note that the there was no any evidence to**

link the appellant with the offence.

ii. That, the learned trial magistrate erred in matters of law and facts by failing to note that the appellant was not found in possession of any exhibit belonging to the complainant.

iii. That, the learned trial magistrate erred in matters of law and fact by failing to note that the light used at the scene of crime is not conducive for proper identification of the appellant.

iv. That, the learned trial magistrate erred in matters of law and fact by failing to note that the appellant was underage during the time of the crime.

v. That, the prosecution did not prove its case beyond reasonable doubts.

Appellant's Submissions

7. The Appellant filed submissions on 5th August 2020. He urges that there is no dispute regarding the crime committed on the material day. That the only dispute is the Prosecution contending to link him with the said ordeal. That he was not the one who robbed the complainant the alleged money and cellphone. That he was not found with anything belonging to the complainant and that the alleged panga was not found in his possession. That the clinical evidence doesn't connect him with the offence and that since he was examined by the clinician, they could have found him with some fluids to connect him with the offence of gang rape. That the incident took place at night yet the light used to identify the appellant was not analyzed by the trial magistrate to prove identification. That the light used at the scene of crime was not conducive for proper identification at that time of the night i.e 8.00 p.m in thicket along the road. That there could be a case of mistaken identity. Citing ***Maitanyi vs Republic*** (1986) KLR 198, urges that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification. He further cites ***Cleophas Otieno Wamunga vs Republic***, Kisumu Criminal Appeal No.20 of 1989 (1989) eKLR. Further, citing ***Lesarau vs Republic*** (1988) KLR 783, he urges that even where identification is based on recognition by reason of long acquaintance, the court should be wary of the possibility of mistaken identity. He further urges that as the assailants were ten (10) according to the complainant, it could have been anyone else other than him. He urges that it was not possible for the complainant to recognize her voice as she stated, since there was nowhere in her evidence where she testified that he had uttered some words. He cites ***Mbelle v R*** [1984] KLR 626 for the factors to be considered in evidence of voice recognition.

8. He urges that in the alternative count of gang rape, the clinical officer PW3 stated that there were no physical injuries observed in the body of the complainant. That it is questionable that the complainant was raped by ten men and she was able to wake up in the morning and report the matter to the police without difficulties of walking. He urges that the clinical officer stated that 'the vaginal examination revealed lacerations around the complainant's anus; no bruises were observed on her vagina and no discharged was noticed.' That the clinical officer told the court that he also examined him, the Appellant and found that he was infected. He urges that despite him being infected, the complainant was not infected and this shows that he is not the one who raped the complainant. That further, the complainant did not claim that she was sodomized or her anus was penetrated and the findings that there was anal penetration contradicts the evidence of the complainant.

9. He urges that there was nothing to link him with the offence. That the complainant told the court she was robbed a cellphone and money but he was not found with anything belonging to the complainant. That the alleged c-line panga was not found in his possession and that the Meru community were using the same to cultivate their farms.

10. He urges that he was a minor when the offence was committed as the clinical officer, PW3 told the court the court that when he, the Appellant was brought to the hospital, he was aged 17 years and the 1st accused was 16 years. He urges that the trial court erred in imposing a sentence of 40 years to him despite the fact that he was a child at the time the offence was committed. He urges that such sentence was in contravention of Article 53 of the Constitution which requires consideration of the best interest of a child. He urged his incarceration ought to have been for the shortest appropriate period of time in line Article 53(1) (f) (i). He urges that it was erroneous for the trial court to sentence him to 40 years imprisonment without making a finding on his age or even make an order of the age assessment. He urges that since he was a minor, he trail Court ought to have dealt with him in accordance with the provisions of Section 191 (1) of the Children's Act which outlaws imprisonment of children or persons under 18 years of age as defined under Section 2 of the Children's Act.

11. He urges that the trial Court erred in dismissing his defence as a mere denial. He urges that an accused has no obligation in criminal cases to give convincing and true defence but the court is under obligation to analyze and evaluate the defence before declaring it as untrue. That the defence has to be considered in light of the prosecution case but not in isolation.

12. He urges that this court is enjoined to re-evaluate, re-assess and re-examine the whole testimonies tendered by the prosecution witnesses and arrive at its own verdict rather than that of the learned trial magistrate. He prays that his appeal be allowed and his conviction and sentence be set aside and he be set at liberty.

Prosecution's Submissions

13. The Prosecution filed submissions dated 15th September 2021. They cite *Oluoch vs Republic* [1985] KLR and *Joseph Njuguna Mwaura & 2 others vs Republic* [2013] eKLR for the ingredients of the offence of 'Robbery with Violence,' which they urge include that 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.

14. They urge that PW1 testified that she was walking home from the local market when she was accosted by a gang of machete wielding youths who threatened her and robbed her of Kshs 18,400 in cash together with a X-tigi make cellphone worth Kshs 3,500 and a 32GB

memory card of indeterminate value. That PW1 further testified that the youths then gang raped her and the Appellant was amongst the persons who she saw raping her. That she recognized the Appellant as one of the perpetrators as they were neighbors. They urge that it is evident that the Appellant was armed with a dangerous weapon, that is a c-line machete, which PW1 saw the Appellant wielding when they attacked her. That the said C-line machete was recovered from the Appellant's house as per the evidence of PW3 at page 20 line 3-4 of the proceedings and it was produced as an exhibit. That the Appellant was accompanied by other persons where by a second person was identified by PW1 and he was charged, found guilty and sentenced to 3 years probation because he was a minor at the time of the incident. That PW1 was also injured and this was done through gang rape by the Appellant and the other assailants and a P3 of PW1 was produced as an exhibit to prove other injuries which PW1 sustained.

15. They cite Section 10 of the Sexual Offences Act for the ingredients of the offence of gang rape. They urge that the ingredients include proof of rape or defilement and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

16. They cite Section 3 of the Sexual Offences Act for the definition of ‘rape’ and Section 2 of the Sexual Offences Act for the definition of ‘penetration.’

17. They urge that in demonstrating this ingredient of the offence, PW1 narrated how she was walking home from the local market when she was accosted by a gang wielding machete who robbed her and then gang raped her. That the clinician, PW3 confirmed that on examination of PW1, it was revealed that there were lacerations around her anus and that a high vaginal swab showed spermatozoa. He produced the P3 form duly filled for the complainant as Pexbt1. That he also produced the treatment notes Pexbt2, a lab test form Pexbt3 and a post rape care form marked Pexbt4. That therefore, PW3 formed the opinion that there was penetration.

18. They urge that PW3 assessed the age of the complainant as 39 years old and the trial court was as well satisfied that the complainant was an adult. They cite *Kaingu Elias Kasomo vs Republic* [2010] eKLR for the proposition that the age of the victim of a sexual assault under the sexual Offences Act is a critical component as it forms part of the charge which must be proved.

19. He urges that with respect to consent, Section 42 of the Sexual Offences Act states that a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. They urge that from the statutory description of consent and going by the testimony of PW1, the complainant, it is clear that she never consented to the sexual activity. That PW1 testified that the attackers were armed with machete which they used to threaten her. That in addition to the above, the trial court found the testimony of PW1 to be truthful, consistent, clear and the same was not at all shaken by the evidence of the Appellant. The trial court had the benefit of evaluating the demeanor of all witnesses while they were testifying. They cite *J.W.A. vs Republic* [2014] eKLR and Mohamed vs Republic [2006] 2 KLR 138 for the proposition that in sexual offence, the proviso to section 124 of the Evidence Act clearly states that corroboration is not mandatory.

20. On identification, they urge that PW1 stated that although it was dark, she recognized the Appellant from the group as one of the persons who raped her since he was her neighbor and she knew him well. Citing the case of *Wamunga vs Republic* (1989) KLR 426 they urge that 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 conviction. They urge that PW1, testified that when she was heading home at around 8.00 p.m some youths emerged from a thicket and she was able to identify the Appellant as being among them. That PWI was able to recognize the Appellant because he was a close neighbour and the altercation and rape took place in close quarters. They urge that, therefore, identification by recognition by PW1 was free from error. That in addition to this, PW1 was also able to recognize the Appellant's voice. Citing the case of *Safari Yaa Baya vs Republic* [2017] eKLR wherein the other case of *Choge -vs- R* [1985] KLR 1 was cited, they urge that evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight.

21. With respect to the Appellant’s defence, they urge that the Appellant only claims to have met PW1 on the evening in question. However, the prosecution's evidence outweighs that of the defence and the prosecution proved its case against the Appellant in both count 1 and 2 beyond reasonable doubt. They urge that according to the evidence on record, on the 19th day of December 2018, the Appellant had asked to be forgiven and wanted to reconcile with PW1 and that this does indeed show guilt on the Appellant's part. However, this request was rejected by the trial court citing its reasons among them being that the nature of offences were grevious, the same was a felony and further that reconciliation would be against sound judicial practice and public interest.

22. On sentencing, they urge that the sentence meted out to the Appellant in both counts was according to the law and was not at all excessive taking into account, the gravity of the offence, circumstances of the offence, nature in which the offence was committed and the injuries suffered by PW1, both emotional and physical.

23. They urge that the Prosecution did in fact prove its case beyond reasonable doubt against the Appellant and pray for the court to uphold both the conviction and sentence.

Evidence adduced at trial Court

24. This being a first appeal, the Court is required to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings, bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.***

25. At this point, the Court will analyze the evidence adduced at the trial Court before delving into the issues for determination. The same is reproduced hereunder.

***P*rosecution's Case**

PW1

27. PW1, the complainant was SM who testified as follows: -

"I am a shopkeeper and grocer at Archers post in Samburu. On 14th October 2018, I was from Archers post heading to my Kandio home and somewhere along the road at around 8.00 p.m, about 10 youths emerged from the thicket out of whom I recognized 2 of them, GK and PN. The youths threatened me with machetes and robbed me of Ksh 18,400/ which was in a purse I was carrying. They also took away my Tigi make cellphone with a 32 GB memory card. The youths then gang raped me. I do not how many of them gang raped me because they were many but G and P were among the rapists. When the assailants released me I went home and slept. I went to Muthara Police station to report the incident the following morning. I went to Muthara hospital for treatment and I returned to the police station to collect a P3 form which was filled at the hospital. I also underwent a lab test and was issued treatment notes all which are before court.

I led the police to the respective homes of G and P and pointed them out before police arrested them. G and P are seated there (pointing at 1st accused and 2nd accused respectively.) They are well known to me being my neighbours. Although it was dark I recognized the accused voices which I am quite familiar with and saw them with my eyes. No recoveries have been made but the machete was recovered from P home."

PW1 (Recalled)

27. When PW1 was recalled after the charge sheet was amended, she testified as follows: -

"My name is SM a resident of [Particulars Withheld and I am a grocer and shopkeeper at Archers post Samburu. In addition to my testimony of 6th September 2018, I was robbed of Ksh 18,400/- in cash, cell phone make X-Tigi worth Ksh 3,500/- with a 32 GB memory card. At the home of PN a C-line machete was recovered by the police in my presence and the weapon is before court. The weapon is the one I saw P wielding on the day he and his accomplices terrorized me. Out of what was stolen from me no recoveries were made."

Cross examination

"I recorded my statement at Muthara police station on the morning of 15th October 2018 at around 6.00 am. I reside at Archers post but I had visited my village at Kandio. Kandio is about a Kilometre from my home. I arrived at Muthara at around 8.00 pm and walked to Kaindio. The distance takes about 10-15 minutes.

It is not true that I met Kennedy Muhuria, Kigunda, Munene, Mugambi and Michael at Muthara. It is not true that I made a sojourn through a bar at Muthara. I was attacked about 200 metres from my Kandio home. The distance I had covered from Muthara was longer than the distance remaining to get to my home. The incident occurred on a Sunday. The accused and their accomplices way laid me on a path off the main road towards my home."

PW2

28. PW2 was No. 119958 PC Sharon Maiyo of Muthara Police Station who testified as follows: -

"On 5th October 2018 the reportee one SM visited our station. at around 7.00 am to report that the previous day at 8.00 pm she was from Muthara market heading home when men out of whom she identified GK and PN accosted her while armed with machetes stripped her naked and raped her in turns. The reportee upon freeing herself from the assailants ran home and informed her relatives. Together with the complainant I proceeded to the homes of G and P and arrested them. The c-line machete used in the attack was recovered at the home of P. The reportee was referred to hospital alongside a P3 form and she was examined and determined that she had been raped. I also escorted both suspects to hospital where they were examined and their respective treatment notes and lab test forms were filled. The machete recovered from P home is also before court. The reportees P3 form is also before court. G and P are seated there (pointing at 1st accused and 2nd accused respectively). They were unknown to me prior to this case."

PW3

29. PW3 was Kenneth Kimathi, a clinician at Muthara sub-county hospital who testified as follows: -

"I have a P3 form filled by Dr. Joan Mwanchama dated 15th October 2018. I am familiar with her signature and handwriting having worked with her for 2 years. It is a P3 form for SM aged 39 years who had a history of having been sexually assaulted by people numbering 10 out of whom 2 of them were known to her at around 8.00 p.m on 14th October 2018. No physical injuries were observed. However, the vaginal examination revealed lacerations around her anus. No bruises were observed on her vagina and no discharge was noticed. The hymen was broken but the scar was old. A high vaginal swab showed spermatozoa. The patient was put on antibiotics, emergency contraceptives, anaelgistics and post exposure proxilasis. The injuries were 19 hours as at the time of filling the P3 form. I also have treatment notes, lab test results forms and post rape care forms whose entries tally with those of the P3 form.

I have the treatment notes for GK aged 16 years and had a history of having been involved in the rape incident according to what the police who brought him to our station informed us. G had a human bite on the right cheek and underwent lab test the latter which turned out negative results. He was put on antibiotics and antitetenus toxoid and post exposure proxilasis.

I also have the treatment notes for PN aged 17 years who was brought into our facility on 15th October 2018 by police who alleged his involvement in the rape incident. P explained that he had been hit on the head with a stone by persons who had been involved in the raping of the woman. No physical injury was observed on P and a laboratory test revealed pus cells in his urinary tract an indication of infection. The patient was placed on anaelgestics and antibiotics. I wish to produce the treatment notes and laboratory tests result forms."

Cross examination

"It is true that I am not the one who filled the P3 form. The doctor who filled the documents is on leave. The P3 form has no name but it has the signature of the doctor well known to me. The P3 form is the old form which does not have a blank space for one name of the doctor. The P3 form does not have the hospital stamp. I have been a clinician for 10 years. Although the vagina had no significant findings but the anus had lacerations pointing at anal penetration. I am not aware of any DNA test conducted to connect any of the accused with the spermatozoa found upon a high vaginal swab. Pus cells were observed on the complainant as well as the 2nd accused suggesting a bacterial infection."

Defence Hearing

DW1

30. DW1, the 1st Accused stated as follows: -

"My name is GK a resident of [Particulars Withheld]and I am a pupil in form 2 at [Particulars Withheld secondary school. I am 16 years. On the night in question I was escorting my cousin SM and when we got to a dark spot we met a group of people in a hurry. The men then ordered S to stop and when she hesitated the men pulled at her and she fell down. She pulled at me in the process and bit me on the cheek thinking that it was her attackers on top of her. She then apologized when I told her that I was the one. I got annoyed and left for home. In the morning police came to arrest me. That's all."

DW2

31. DW2, the Appellant testified as follows: -

"My name is PN a resident of Kanyulu and I am a farmer. I recall that on the evening in question I was at a bar in [Particulars Withheld and I met a group of men drinking with SM. I left briefly and upon my return to the bar I saw a commotion. Suddenly I was hit on the head. I fell down and left for home. The following morning at 8.00 am I was arrested on rape and robbery charges. That's all.

Issues for Determination

32. The Appellant's grounds of Appeal can be condensed into 2 main issues: -

i. Whether the Prosecution proved their case beyond reasonable doubt.

ii. Whether the sentence meted out by the trial Court was illegal and/or excessive in the circumstances of the case.

Determination

i) Whether the Prosecution proved their case beyond reasonable doubt.

Count I: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code

33. The necessary ingredients for the offence of 'Robbery with violence' as per Section 296 (2) of the Penal Code' are as follows: -

'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.'

34. The gravamen of the Appellant's appeal relates to identification and possession. He claims that he was not positively identified by the complainant and that the weapon allegedly used in the incident was not found in his possession.

Identification of the Appellant

35. The complainant narrated how the incident of robbery with violence happened. She testified that on 14th October 2018, at about 8.00 p.m, she was heading from Archers Post where she sells groceries headed home to Kandio when about 10 youths emerged from the thicket, 2 of whom she recognized as GK (1st accused) and PN (2nd accused/Appellant). She testified that the youths threatened her with machetes and robbed her of Ksh 18,400/ which was in a purse and her Tigi make cellphone with a 32 GB memory card.

36. The Appellant urges that there was no indication of how intense the lighting was at that time of the night thereby casting doubt on his identification. The Court has perused the record and observes that the details of the lighting at the scene of crime was not described.

37. This notwithstanding, the Court considers that the complainant testified that she was very familiar with the Appellant. She testified that she was able to identify him by his voice and that she also saw him with her eyes. She testified as follows: -

> **"I led the police to the respective homes of G and P and pointed them out before police arrested them. G and P are seated there (pointing at 1st accused and 2nd accused respectively.) They are well known to me being my neighbours. Although it was dark I recognized the accused voices which I am quite familiar with and saw them with my eyes."**

38. This Court rejects the Appellant's contention that the complainant's the omission to indicate what words he had uttered during the attack rules out his voice identification. This Court considers that it is possible that he spoke and his voice was recognized but the Appellant was unable to register the exact words owing to the nature of the attack, which did not stop at robbery with violence but extended to gang rape as per Count II to be discussed hereunder. This Court also takes note of the fact that the Appellant did not raise this issue during hearing at cross-examination stage and it thus appears to be an afterthought.

39. The Court also observes that the complainant testified that she was a neighbor to the Appellant. In his defence, the Appellant did not deny knowing the complainant. In fact, he described her using her two names, thus inferring familiarity. During cross-examination, the complainant testified that the attack happened about 200 metres from her home and this proves that the attackers were indeed from her neighbourhood. The complainant's positive identification of the Appellant is further supported by her testimony that she led the police to the Appellant's home. This testimony was corroborated by that of PW3, the investigating officer, who confirmed that the complainant had led her to the Appellant's house on the following day, 15th October 2021. This Court finds that the Appellant's identification as one of the assailants was positive.

Linkage of the Appellant to the Robbery

40. The Appellant urges that he was not found with the stolen items. This Court has confirmed from the record that none of the items said to have been stolen were recovered. The ingredients for the offence of robbery with violence are however not limited to the aspect of theft. It extends to the aspect of being armed with a dangerous weapon, use of violence and whether the assailant was in the company of others. Section 296 (2) uses the term 'or' as opposed to 'and' as follows: -

> **'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.'**

41. The above means that if either of the stand alone ingredients are proven against an accused, then the charge will have been proven. In the present case, the complainant testified that she saw the Appellant wielding a machete as the gang came towards her. The said machete was recovered from the Appellant's house. He did not offer any explanation as to how he came to have possession of the said weapon. This Court does not find it a coincidence that the weapon used to threaten the Appellant was found in his house. Being armed with a dangerous weapon is in itself a factor which infers guilt for the offence. It matters not whether the weapon was used to inflict actual physical harm. In the present case, not only was the Appellant armed with a dangerous weapon but he was also in the company of 9 others. These facts adequately link the Appellant to the offence of robbery with violence.

42. The Court finds that the Prosecution proved the charge of Robbery with Violence against the Appellant beyond reasonable doubt.

Count II: 'Gang Rape contrary to Section 10 of the Sexual Offences Act.'

43. Section 10 of the Sexual Offences Act provides as follows: -

> **10. Gang Rape**
>
> **"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 than fifteen years but which may be enhanced to imprisonment for life."**

44. The complainant herein said to be 39 years old at the time of the offence was an adult and the offence in question is therefore rape. She testified that on 14th October 2018, she was headed home from Archers Post when she was attacked by a gang of 10 men who robbed her and thereafter raped her one after the other, one of whom was the Appellant. The Court has already discussed above that the identification of the Appellant as one of the assailants was positive as he was a neighbor and the complainant even led the police to his home on the next day after the incident.

45. The complainant was the only eye witness in the matter. The other two witnesses were the clinical officer and the investigating officer

whose roles in the matter came hours later, on the next day. This Court considers that the proviso to Section 124 of the Evidence Act exempts the evidence adduced in sexual offences cases from the requirement of corroboration, if that is the only evidence available. It provides as follows: -

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

46. The medical evidence adduced by PW3 confirmed that upon examination of the complainant, lacerations around her anus were observed and that a high vaginal swab revealed spermatozoa. She was put on antibiotics, emergency contraceptives, anaelgestics and post exposure proxilasis. This Court is thus convinced that there was penetration of the complainant's genital organs which as per the definition under Section 2 of the Sexual Offences Act extends to the anus for purposes of the Act.

47. The Court has taken note of the Appellant's assertion that the complainant did not complain of her anus having been penetrated and therefore, the medical evidence contradicts that of the complainant. This Court finds otherwise. Upon a keen perusal of the records, the Court observes that the complainant merely testified to have been raped and did not go into the details of whether the penetration was in her vagina or anus. The medical evidence, however, reveals that there were lacerations in her anus. This observation was consistent in the P3 form, the Post Rape Care form and the treatment notes from Muthara Sub-County Hospital. This Court considers that penetration for purposes of the Sexual Offences Act includes the insertion of one's genital organs into the genital organs of another and as per Section 2 of the Sexual Offences Act, genital organs include the anus.

48. This Court does not accept that the failure of the complainant's examination to show that she was infected and yet the Appellant was infected absolves him from the offence. The Court considers that the viruses causing infections take time, some up to months to fully manifest and be noticeable upon examination. The Court does not also accept that the fact that the complainant was able to wake up on the following morning and take herself to the police and to hospital is a reason to doubt whether she was raped. The Court considers that she was an adult woman of 39 years and the actions she took on the following day were the logical, practical and prudent things for any such victim to take.

49. The Court finds that the Prosecution proved the charge of gang rape contrary to Section 10 of the Sexual Offences Act against the Appellant beyond reasonable doubt.

ii) Whether the sentence meted out by the trial Court was illegal and/or excessive in the circumstances of the case.

50. For Count I, 'Robbery with violence contrary to Section 296 (2) of the Penal Code' the Appellant was sentenced to 20 years imprisonment. The penalty section for the offence of robbery with violence provides for the death penalty. This Court thus finds that the Appellant was in fact given a lenient sentence. His argument that he was given a harsh sentence despite being a minor at the time of the offence does not hold water because although he was a minor of 17 years at the time of the offence, at the point of sentencing, he had already attained the age of majority and was no longer a minor. In any event, this Court finds that the trial Court in fact exercised leniency and sentenced him to 20 years as opposed to the prescribed death penalty.

51. For Count II, 'Gang Rape contrary to Section 10 of the Sexual Offences Act' the Appellant was sentenced to 20 years imprisonment. The penalty section for gang rape provides for a minimum of 15 years imprisonment which may be enhanced to imprisonment for life. This Court thus finds that the 20 years imprisonment was within the confines of the law.

52. What the Court observes is that the trial Court did not indicate whether the 20 years imprisonment terms for each of the counts were to be served consecutively or concurrently. This Court finds that when an accused is charged with more than one offence based on a series of one transaction, the practice should be for the Court to adopt concurrent sentences, unless there are exceptional circumstances calling for imposition of consecutive sentences. See ***Ng'ang'a vs Republic, Criminal Appeal No. 882 of 1975 (1981) KLR 530.*** See also ***Ondiek vs Republic, Criminal Appeal No. 34 of 1975 (1981) KLR, 431.***

53. The Court orders that the twenty (20) years imprisonment term for each of the counts will run concurrently.

Conclusion

54. The complainant, PW1 was walking in the night on 14th October 2018 from her work place at Archer's Post to her home in Kaindio. At about 8.00 p.m, while still on her way, she was attacked by a gang of 10 men, one of who was wielding a machete at her. The group robbed her cash of Ksh 18,400/=, a mobile phone make Tigi, sim card and 32 GB memory card valued at Ksh 25,000/=. She was thereafter gang raped by the group of men.

55. Out of the 10 men who attacked, robbed and raped her, she was able to identify 2, one of whom was the Appellant. She identified him by his voice, by seeing him and further, he happens to be a neighbor who she was very familiar with. She is also the one who led the police to the Appellant's home on the following day. This Court, therefore, finds that the Appellant's identification was positive. The Court also considers that the machete which was the weapon in the robbery incident was recovered from the Appellant's house. The Court thus finds that the charge of robbery with violence contrary to Section 296 (2) of the Penal Code against the Appellant was proved beyond reasonable doubt.

56. There was medical evidence which confirmed that the complainant had been raped. PW2 testified that upon examination, it was observed that the complainant had lacerations around her anus and that a high vaginal swab revealed spermatozoa. She was then put on antibiotics, emergency contraceptives, anaelgestics and post exposure proxilasis. The medical evidence was consistent in the P3 form, the Post Rape Care form and the treatment notes from Muthara Sub-county hospital. This Court is convinced that the charge of Gang Rape contrary to

Section 10 of the Sexual Offences Act against the Appellant was proved beyond reasonable doubt.

57. As to sentencing, this Court finds that the sentence meted out by the trial Court was within the confines of the law and in fact lenient. The Court however observes that the trail Court was silent on whether the 20 years imprisonment for each of the counts were to run concurrently or consecutively. This Court finds that as per the principle ***Ng'ang'a vs Republic (1981) KLR 530*** and ***Ondiek vs Republic (1981) KLR, 431,*** where an accused is sentenced for more than one offence based on a series of the same transaction, concurrent sentences should be adopted. The Court will therefore order that the sentences be served concurrently.

ORDERS

58. Accordingly, the Court makes the following orders: -

i. The Appellant's appeal on conviction for Count I, Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code is declined and the trial Court's finding is hereby upheld.

ii. The Appellant's appeal on conviction for Count II, 'Gang Rape contrary to Section 10 of the Sexual Offences Act' is declined and the trial Court's finding is hereby upheld.

iii. The Appellant's appeal on sentence for Count I is declined.

iv. The Appellant's appeal on sentence for Count II is declined.

v. The Court orders that the Appellant shall serve the 20 years imprisonment sentence for each of the counts concurrently.

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER, 2021

EDWARD MURIITHI

JUDGE

Orders accordingly.

Appearances

P Ntongai, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.