REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL CASE NO. 28 OF 2018

GILBERT KIPKOECH CHERUIYOT.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at ELDAMA RAVINE

Criminal Case No. 427 of 2017 delivered on the 11th day of April 2018 by Hon. Nthuku, J. N., SRM]

JUDGMENT

Introduction

[1] The appellant was on 11th April 2018 convicted for the offences of robbery with violence contrary to 296(2) of the Penal Code and section 3 of the Sexual Offences Act No. 3 of 2006 and sentenced, respectively, to suffer death and to imprisonment for ten (10) years, the latter sentence being held in abeyance in view of the first sentence.

[2] The appellant had been charged before the trial court as follows:

> ***Count I****: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE*
>
> ***Particulars of the offence:*** *GILBERT KIPKOECH CHERUIYOT: On the 13th day of June 2017 in Koibatek sub county within Baringo county robbed JKK of two mobile phones make Bird and Techno all valued at Ksh.1800/=, cash Ksh.455/=-and immediately before the time of such robbery used actual violence to the said JKK*
>
> ***ALTERNATIVE CHARGE:*** *HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322(1)(2) OFTHE PENAL CODE.*
>
> *GILBERT KIPKOECH CHERUIYOT: On the 13th day of JUNE 2017 at Boito trading, centre in KOIBATEK Sub County within BARINGO county, otherwise than in the course of stealing, dishonestly retained two mobile phones make Bird and Tecno knowing or having reasons to believe them to be stolen goods.*
>
> ***COUNT 11:*** *RAPE CONTRARY TO SECTION 3(1)(a)(3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.*
>
> *GILBERT KIPKOECH CHERUIYOT: On the 13th day of JUNE 2017 in KOIBATEK Sub County within BARINGO County, intentionally and unlawfully, caused his penis to penetrate the anus of JKK without his consent.*
>
> ***ALTERNATIVE COUNT:***
>
> *INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11A OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.*
>
> *GILBERT KIPKOECH CHERUIYOT: On the 13th day of JUNE in KOIBATEK Sub County within BARINGO County, committed an act which caused " his penis to come in contact with the anus of JKK against his will."*

[3] The Prosecution called seven witnesses and the appellant when placed on his defence gave sworn testimony.

Judgment of the trial court

[4] The trial court after analysing the evidence before it found the appellant guilty in its Judgment dated 11th April 2018 as follows:

"***Judgment***

The issues for this court's determination are:

1) Has it been proved that PW1 was robbed of a phone on 13th June, 2017. If yes;

2) Has the identity of robber/robbers been proved;

3) Has penetration been proved. If yes;

4) Has it been proved the same was done without his consent.

On the first issue above. the complainant testified that he was robbed of a techno phone and a Bird phone both valued at Kshs.1800. He made a report to the Police Station stating that the two phones were stolen/robbed from him together with 544 shillings. After arrest of the accused person. the complainant said the phones were recovered under the accused person's mattress. PW5 and PW6 both testified that the accused person led them to his house where the stolen phones were found hidden under the mattress and the complainant positively identified them as his. The two phones were produced as exhibits herein. On this issue I am satisfied that the complainant was robbed of two phones. On the date of the Robbery. it's important to note that the complainant testified that he left the bar at 10:30pm and smoked while waiting for a motorcycle. Upon cross examination he said he was robbed on 12th June 2017. The bar owner PW5 testified that after the days' sales he left the bar past midnight of 12th June 2017 meaning it was already 13th June. 2017 and that's when he found the complainant and the accused sharing/smoking cigarettes at the verandah of the bar. It is, therefore, clear the incident was on the night of 12th June. 2017 and 13th June 2017 hence the reason why the charge sheet reads as 13th June 2017.

Whether the robbery was violently done;

Section 296(1) Penal Code provides the ingredients for a charge of Robbery with violence and the same were summarized by the Court of Appeal in Court in Oluoch Vs. Rpublic (1985)KLR where it was held: Robbery with violence is committed in any of the following circumstances: a) "The offender is armed with any dangerous and offensive weapon or instrument b) The offender is in company with one or more person/persons or c) At the time of robbery, immediately before or immediately after the time of robbery the offender wounds, beats, strike or uses other personal violence to any person". In present case, the complainant says he was beaten/knocked on the head, strangled and threatened with death if he dares scream. The doctor who examined him found his face to have bruises and his neck too. His clothes which were produced in court were blood stained and he said this was due to the violence meted upon him by his attacker during the robbery. From this evidence and the P3 forms I am satisfied that violence was used so this amounts to robbery with violence.

On the identity of the attacker, the complainant said that he was robbed by the accused person herein whom he knew as alias Kemoda and a person who sew potato sacks at Timboroa. He said he had shared a cigarette with the accused person moments before the attack and that the incident took place at a verandah of a bar where there is an electricity bulb whose light enabled him to see and recognize the accused person. PW5 the bar owner corroborated the evidence of PWl on the issue of the accused sharing a cigarette at the verandah where an electricity tube/florescent was lighting and he recognized both accused and complainant then left. He said that both were people known to him. The accused person chose unsworn evidence so the same could not be tested on cross-examination and its probative value therefore is very low. He places himself at the scene and said he fought with the complainant because the complainant was demanding money from him. His evidence can, however, not stand because the complainant after being found in a pool of his own blood said he was robbed and raped by the accused person and upon his arrest by the village elder the accused person led Police officer PW6 and also PW5 to his house where the complainant phones were found under the accused person's mattress. He didn't explain how after the fight he ended up with the complainant's phones. This clearly means there was no fight but robbery.

Secondly during cross examination. even after recalling the complainant for further cross examination he never said anything about a fight or any differences that erupted between the two these two had no grudges/disagreements and that's why even from PW5's evidence they set and smoke cigarettes without quarrels. The defence of a fight is an afterthought and I reject it. I am satisfied that the accused is the one. who robbed PW I on 13th June 2017. On the issue of penetration. PWI said that after being robbed the accused person threw him on the ground and removed his trousers then penetrated his anus. Ile attempted to resist but the accused person knocked his face against the ground making him nose bleed then he raped him. The doctor confirmed that there were sperms found in PWI's rectum a few hours after the incident. When he went for treatment. He had bruises around the anus and many red blood cells and epithelial cells due to trauma. The P3 forms PRC forms and doctor's evidence corroborated the complainant's evidence that there was penetration. The injuries on the complainant's body clearly show there was no consent. He said he was forced into submission by violence hence he didn't willingly engage into anal sex with the accused person.

The evidence of the complainant is further supported by the exhibits (clothes) the complainant's clothes were blood stained. Had he consented to sex he would not need to be beaten to the point of bleeding. I find that the accused person herein raped the complainant after robbing him. I therefore. find that the charges of Robbery with Violence Contrary to Section 296(2) of the Penal Code have been proved against the accused person beyond reasonable doubt and I hereby convict him under section 215 of the Criminal Procedure code Cap 75 Laws of Kenya. Clearly rape contrary to Section 3 of the Sexual Offences Act has been proved against the

accused person beyond reasonable doubt and I convict him under Section 215 of the Criminal Procedure Code cap 75 Laws of Kenya.

Hon. Nthuku J.N

Senior Resident Magistrate"

Sentence by the trial court

[5] In sentencing the appellant, the trial court imposed a death sentence for the robbery with violence and imprisonment for 10 years for the offence of rape, the latter sentence being held in abeyance as follows:

*"**Court:***

For the offence of robbery with violence I sentence the accused person to suffer death. For rape I sentence him to ten years imprisonment. However, in view of the death sentence the 10 years will be held in abeyance. *Right of appeal 14 days.*

Hon. Nthuku J.N

Senior Resident Magistrate."

The appeal

[6] Being dissatisfied with the Judgment of the court, the appellant filed an appeal from both conviction and sentence as follows:

"Amended GROUNDS OF APPEAL

1. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant on evidence of identification by recognition but failed to note that PW l was a single identifying witness in difficult circumstances.

2. That, the learned trial magistrate erred in law and fact by awarding a sentence in a prosecution case given by PW l but erred grievously when he failed to caution himself on the dangers of convicting on evidence of a single witness.

3. That the learned trial magistrate erred in law and fact by holding that the offence of robbery with violence was proved as against the appellant but failed to note that, the ingredients of the charge under section 296/2 of the Penal Code were not proved as against the appellant.

4. That the learned trial magistrate erred in law and fact by failing to critically analyse the appellant's defence and erred by not giving it an objective analysis.

5. That the learned trial magistrate failed to consider the appellant's mitigation, circumstances of the commission of the offence and awarded a harsh and cruel sentence, thus the appellant therefore prays for case re-hearing for the purpose of sentence rehearing and re-sentencing as was held in the supreme court decision in KARIOKO MURUATETU AND ANOTHER VS REP PETITION NO. 15 OF 2015.

REASONS WHEREFORE: *I pray for the total success of this appeal I. Conviction quashed 2. Sentence set aside and 3. Appellant set at liberty.***"**

Appellant's submissions

[7] The appellant further filed written submissions dated 2nd May 2020 urging the court to reduce the sentence and take into account the period that he remained in custody awaiting the conclusion of his trial, as follows:

*"**WRITTEN SUBMISSIONS***

My lords having set down my amended grounds of appeal in the previous pages, I now beg leave of the honourable court to allow me expound them comprehensively in both mixed matters of law and facts where the learned trial magistrate erred. The pages marked in red pen marks reference

GROUND NO.1 AND 2 MERGED IDENTIFICATION WAS NOT FREE FROM THE POSSIBILITIES OF ERROR

The appellant's conviction and sentence was premised on evidence of identification by recognition by PW1. I submit this was evidence of a single witness at difficult circumstances thus, the possibilities of error cannot be ruled out. The evidence of PW I was that, he met the appellant on 12th June 2017 at 10:30 pm outside jubilee bar. [Stated on pages 7 lines 11-12] On cross examination he told court nobody witnessed the incident. [stated on pages 22 lines 5] from this evidence it is correct to infer that PW l was a single identifying witness. PW1 does not give evidence on the intensity of light, the source of light and its proximity to that light. [On

pages 7 lines 18]. On the issue of identification, the court set out what constitutes favourable conditions for correct identification by a sole testifying witness in MAlTANYI VS REP [1986J KLR 196 as follows; " subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with great care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed in other evidence, whether it be circumstantial or direct pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as from the possibility of error. "Before a court passes a conviction and sentence of MWAURA vs REP [1987] KLR 645 in which the court of appeal held; " in cases of visual identification by one or more witnesses, a references to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing is what is alleged, the position from the accused and the quality of light. In addition it has been stated by the court of appeal in ANJONONI and OTHERS -VS – REPUBLIC [1976- 1980] KLR 1556 that when it comes to the identification, the recognition of the assailants is more satisfactory, more assuring and more reliable that identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. In the instance matter, PW 1 claims he was accosted by the appellant. He claims it was at night 10.30pm. He claims to know the appellant. However, in his chief evidence he refers the appellant as Kimonda. He claims to know the appellant. He claims he knew the appellant names as GILBERT KIPKOECH CHERUYIOT, when he identified himself to the police.

In OLUOCH VS REP [1985] KLR 549, the court held that proof of anyone of the ingredients of robbery with violence is enough to base a conviction of the offence under section 296 (2) of the penal code. In the present appeal PW I stated that he was accosted by one person whom was not in company with one or more other person or persons. PW1 stated that his assailant was not armed with any dangerous weapon or offensive weapon by the time of attack (stated ion pages 7 lines 19-22). [am inclined to follow the explanation of the superior court in the decision of JOHANNA NDUNGU VS REP, where the court stated, " in order to appreciate properly as to what acts constitute an offence under section 296 (2) OF THE PENAL CODE; one must consider the subsection in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use or the threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribe in section 296 (2) of the Penal Code defined earlier anyone of which if proved will constitute the offence under section 296 (2). Analysing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No any other fact is needed to be proved. If the facts show that at the time of the commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore described, then he is guilty of the offence under sub-section (2). In the instant matter, the offender was not armed with a dangerous weapon; he cannot therefore be guilty of an offence under sub section (2). The court went on to explain in the same manner in the second set of circumstances if it is shown and accepted by the court that at the time of the robbery the offender was in company with one or more persons then the offence under sub-section (2) is proved and the conviction there under must follow. The court is not required to look for the presence of either of the other two sets of circumstances. This set of circumstances was not met in the instance matter. My lords, it is plain truth that the evidence before you does not meet the threshold defined under the cited cases. In JOHANNA NDUNGU the learned trial magistrate had found that, when the offence is not aggravated, it should not be termed as capital robbery but should fell under subsection [I] not subsection [2]. It was on the error to convict under section 296 [2] of the Penal Code. The other issue not considered was the recovery of the purported stolen cell phones. Pw5 told court it's the accused who led them to his house and they recovered the two phones. A techno and bird [stated on pages 24 lines 7-9}. Pw6 stated that he rescued the appellant from a large crowd who wanted to kill him. [Stated on pages 25 lines 5-7] pw6 does not state that, the appellant let him to his house. In fact, he does not mention that there was any recovery. Pw7 corroborates the evidence of pw5 [see pages 26 lines 6-8]. My lords, under section 57 of the national police service act, requires that at the time of arrest the police officer shall record all the items recovered from the suspect at the time of arrest and shall make an inventory of the same. Under section 25 of the CPC requires the police to take inventory in totalling at the scene. Pw5, pw6 and pw7 are knowledgeable police officers. They did not prepare an inventory to prove what they alleged. In-fact the exhibits before you are not identified. What do I mean by this? TECHNO - is a company that manufactures electronic appliances it is not a specific item. A phone is bound to be identified by IMEI number [international mobile equipment identification number] there can be no other way to distinguish between similar gadgets with similar references. No receipts or marks of identification were produced in court to prove ownership. Birds- just like techno is a company that manufactures electronic appliances and not a specific item. [Submitted as a above] In JAMES MACHARIA -VS - REP. HCCR APP. No. 765 and 785 the court held that, Mere or bare words are not sufficient for identification of exhibits where there are no receipts for identification. No witness conclusively connected the appellant with the purported stolen items. The court failed to consider the way the robbery was conducted. Pw5 and pw7 claims it was in a house. There were no receipts brought to show who reported this house. No independent witness was brought to clear the air that the appellant lived in this house. No care taker or the owner of the plot number to say there was such on house. The police failed to call the local administrators, e.g., chief or sub-chief to say the appellant was a resident there as evidence shows. What remain was the words of the prosecution witnesses against the words of the accused. This was not proved beyond reasonable doubts. in similar matter in KENY ARITHI S/O MWANGI -VS- REP. [1965] E.A.C.A, the appellant was a quintet for failure of the police to produce evidence or witnesses to prove that, goods were recovered at the accused place.

GROUNDS NO FOUR IN SUBMISSIONS DEFENCE WAS NOT CONSIDERED

The appellant clearly told court that, this was a drinking issue that turned sour. He blames the complainant by fixing him in a robbery he did not commit. He told court that PWI needed money which the appellant declined to give, a fight ensured which left the complainant injured, he declared there was no fight at all. The prosecution failed in law by failure to conduct a thorough investigation in this matter. Evidence produced was shaky, flimsy, and baseless. No witness saw the time the offence was truthful and raises doubts to the mind of the court. How could one plan a robbery alone and not armed? In OUMA -VS - REP. [1986] the Court of Appeal held that,

"At the time of evaluating the prosecution evidence, the court must have in mind the accused persons defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is any doubt, the benefit of that doubt always goes to the accused person. That did not appear to have been a lone in this case. I humbly beg, may the honorable court humbly evaluate the evidence the evidence as adduced, by the lower courts, peruse through the lower courts proceedings and

judgment, peruse through my amended submissions and find that, my conviction and sentence was not founded on safe evidence.

GROUND NO FIVE IN SUBMISSIONS CASE RE- HEARING FOR SENTENCE REHEARING FOR RESENTENCING PROCESS.

My lord, sentencing is a judicial process. It forms part of trial proceedings. It must therefore be conducted in accordance with the law and the already set guidelines already in place. Article 25 (c) and article 50 of the constitution which gives every litigant a right to a fair trial and fair hearing need to be followed. The appellant before sentence gave a mitigation which I submit was not followed by the learned trial magistrate. I humbly submit the appellant in his mitigation told the court that he is an orphan and asked for leniency. Thus he was remorseful. [Stated on page 54 line 41. The trial court on sentencing the appellant held; "for the offence of robbery with violence, I sentence the accused person to suffer death [stated on page 54 line 6-7]. This sentence was an error in law. The court did not consider the appellant's mitigation and the circumstances which prevailed during the time the offence was committed. The trial magistrate did not conduct a sentence re-hearing exercise, weigh the circumstances that prevailed at the time the offence was committed and any other mitigating circumstances the court could have considered to enable it to arrive at a reasonable sentence. I submit that section 296 (2) of the penal code makes the death sentence mandatory for offences of robbery with violence. It deprives the court the use of its judicial discretion under Article 165 (3) (a) of the constitution. That the High Court has unlimited jurisdiction in hearing of criminal matters when an appeal is filed and can pass any sentence which the court deems as appropriate given the circumstances of the case. He applied the mandatory provisions of section 296 (2) blindly without giving any considerations to mitigating circumstances. This is what the Supreme Court warned against in the decision of FRANCIS KARIOKOMURUATETU AND ANOTHER VS REP, (2017) under section 296 (2) of the penal code, the unlimited jurisdiction becomes a limited one in relation to sentencing. I submit this unlimited original jurisdiction should not be limited by statutory provisions. It is my submission that such a law can only be regarded as unjust and unfair as the sentence imposed fails to conform to the fair trial tenets that accrue to accused persons under Article 25 (c) of the constitution and ARTICLE 50 (1) fair hearing before a mandatory death sentence can be imposed, there is a higher responsibility on the court to ensure that due process in respect in passing of that sentence is not imposed through blind application of the statutory prescriptions. The supreme court in Muruatetu held that, "to our minds, any law or procedure which when executed culminates in termination of life ought to be just fair and reasonable. As a result, due process is made possible by a procedure which allows the court to access the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty has counter to constitutional guarantees enshrined under the rule of law. The Supreme Court has held that; "we are in agreement and affirm the court of appeal decision in GEOFFREY NGOTHO MUTISO VS REP, CR. APPEAL NO. 17 OF 2008 that whilst the constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. I submit the Supreme Court has not outlawed the death sentence, but it holds that blinds application of a mandatory of death penalty would be unconstitutional if the accused person is not guaranteed the full dignity of a trial on sentencing and for failure of the trial court to exercise its sentencing discretion. This is what transpired in this particular matter, I humbly and wish much respect seek an order for case - re-hearing for the purpose of re-sentencing. May the honorable court humbly evaluate the evidence before it, as presented by the lower courts, peruse through my submissions and find that, my conviction and sentence was not founded on sound evidence. REASONS WHEREFORE: I pray that, may this appeal be allowed, conviction quashed, sentence set aside and the appellant set at liberty.

GILBERT KlPKOECH CHERUIYOT. APPELLANT"

DPP's submissions

[8] The DPP opposed the appeal in Submissions dated 18th June 2020 as follows:

"<u>SUBMISSIONS FOR THE PROSECUTION</u>

The appeal is opposed.

The appellant herein was convicted with the offence of Robbery of Violence contrary to section 296(2) of the Penal Code with an alternative of handling stolen property contrary to section 322(1)(2) of the Penal Code and the offence of Rape contrary to section 3 of the Sexual Offences Act with an alternative of Committing an indecent act contrary to section 11A of the Sexual Offences Act. He was sentenced to death in the first count and to ten (10) years in the second count to be held in abeyance.

PW1 testified that he knew the appellant herein well. The appellant used to live around Boito stitching sacks for potatoes. This was confirmed by PW2 who stated that they used to work together. PW1 testified that on the material day he saw the appellant in Boito centre at Jubilee Bari where he was having drinks. At about 10.30pm he walked outside to look for a motorbike to take him home, he was joined by the appellant herein who borrowed a cigarette from him. The appellant sat with the complainant for around fifty minutes to one hour as they shared a cigarette. There were also security lights outside the bar where they were sitting.

PW5 the owner of Jubilee bar testified that he left the bar at around midnight. He found the complainant and appellant sitting next to the veranda of the bar smoking cigarettes. Both of them were known to him. He identified them through the security lights of the verandah. PW1 testified that he saw a motorbike and as he rose and moved forward, the appellant held his neck and pushed him down. He identified the appellant and asked what the problem was but the appellant told him to keep quiet or he would kill him. He searched his jacket and removed two phones make Techno and Bird and Kshs.455. He then proceeded to sodomize the complainant before he left. The complainant sustained injuries on the nose, neck, knee and the anus. This was confirmed by PW4 who filled the P3 form and reviewed the complainant. He testified on examination that the complainant had bruises on his face and neck and had pain passing stool. On anal examination he had fissures and bruises. He was HIV positive and was on ARV's. He also examined the appellant who was HIV negative and placed on pre-exposure prophylaxis. PW5 and PW7 both testified that upon arrest, the appellant led them among others his house from where the two phones belonging to the complainant were recovered under the mattress. The appellant showed them where the phones were. They were recovered and the complainant identified both phones as his. ***The evidence against the appellant is overwhelming. I urge this court to dismiss the appeal on conviction but may review the***

death sentence in line with the Muruatetu Case

Dated at Kabarnet on this 18th day of June 2020.

Ms. Caroline Muriu

Prosecution Counsel"

Determination

Issue for determination

[9] In accordance with its duty as a first appellate court (see ***Okeno v. R*** (1972) EA 32), this court shall re-evaluate the evidence before the trial court to form its own conclusion as the guilt or otherwise of the appellant, before considering, if necessary, the request for review of the sentence of the trial court. The issues raised on the appeal and submissions thereon are (1) the proof of offences robbery with violence and rape, and (2) the identification of the appellant as the assailant.

The ingredients of the main offences charged

[10] Robbery with violence c/s 296 of the Penal Code is prescribed as follows:

> *"296(2.) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately 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"*

As properly observed by the trial court the ingredients of the offence of robbery with violence were set out in the case-law authority of ***Oluoch v. R***, supra, as follows:

> *"6. (Obiter) It is not the degree of actual violence that differentiates the offence of robbery and robbery with violence.* ***Robbery with violence is committed in any of the following circumstances:***
>
> *a) The offender is armed with any dangerous and offensive weapon or instrument; or*
>
> *b) The offender is in company with one or more other person or persons; or*
>
> ***c) 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."***

[11] Rape is prescribed under section 3 of the Sexual Offences Act No. 3 of 2006 as follows:

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

[12] It was incumbent on the Prosecution to adduce evidence to establish the existence of the said ingredients for the respective offences. The court would consider the alternative charges, if the main counts are not established.

The Evidence

[13] The evidence before the trial court was as follows:

> **PW1** (the complainant) testified as follows:

I come from Kapsoit and I am a peasant farmer. On 12th June, 2017 at 10:30pm I was in Boito Centre at Jubilee Bar and since it was getting late, ***I went outside the Bar and decided to wait for motorbike outside the bar and I sat on a stone and I lit my cigarette and Gilbert alias Kemoda who is the accused herein and I used to see him around that Centre. I had infact seen him at Jubilee bar though we were not together. He then asked me for a cigarette and I gave it to him. Since it was outside the verandah of the bar the lights were on and I could see clearly. As I saw motorbike was not coming, I stood and when I just slightly moved someone held my neck and pushed me down and on turning I saw it was him and he came in front of me and I identified him and I asked him what the problem was and he said I keep quiet or he will kill me. He then searched my jacket and removed my phones make Tecno and Bird and took them on opposite pocket I had Ksh.455 which he also took and he was searching my pockets and I wanted to leave but he held my neck again and pushed me and I fell down and hit my knees and I tried to scream and he hit my head on the ground and I hit my face against the ground and he then sat on my back and I asked what was the problem yet he had already robbed me. He then threatened that if I scream he will kill me. He then removed my trouser and I was lying facing down and when I tried to raise my head he would hit me against the ground and I bled from nose and lip and I could slightly turn to the sides and he knelt and he removed his trousers and he then lowered my trouser and inner wear. I did not see if he was wearing an inner wear but he then lowered his trousers and he then raped me through my anus and at that time he had threatened to kill me hence I kept quiet. After he finished he asked me to remain lying down and he left and I then dressed and I was profusely bleeding from the nose and my left knee and as he held side of my neck it had a scratch and neck was paining. Since I was in fear he might come back I decided to remain at the bar's verandah where he had pulled me to and raped me at that cemented verandah. I then decided to sleep as in fact I was weak due to bleeding and in fear. At day time passer-by saw me and one Bernard came to interrogate me and a crowd had gathered and I was trembling as it was cold and I had spent night there and they brought me tea. I did inform Bernard what had happened and they took me to Timboroa Dispensary and it was in the morning and it was closed due to doctor's strike and on our way to private hospital, we heard that Kimonda had been arrested and we first came to report at Timboroa Police Station and we recorded statement and shortly accused was brought to the station and both of us were put in private vehicle and brought to Eldama Ravine District Hospital and I was also with two Police officers, my sister and father and Siele the driver. I was examined and treated and discharged and went through the Police Station and while returning the accused had been interrogated and said the phones were at his house and I remained in the car with my father and two officers, Siele left with the accused and on returning brought phones which I was shown at the Police Station and I was able to recognize and are the ones in court.***

-Techno - identified from the three lower buttons which have come out and the back cover crack - MFI 1.

- Bird - identified as one left side button is out and inside screen has slightly moved (shown) MFI 2 .

The Techno phone I bought at Ksh.1000 while bird at Ksh.800 hence both cost Kshs.1,800 .:. Treatment chit from Eldama Ravine District Hospital - MFI 3 .:. PRC form - MFI 4 .:. P3 form - MFI 5 We then recorded our statements and I later learnt Kimonda was also known as Gilbert Kipkoech Cheruiyot as he identified himself to Police in those names. I used to know him around Boito stitching sacks for potatoes but I had no relation with him and ifs the accused in court (points out). On material date I was wearing a black trouser - identified with blood stains on light side of pocket which was from my nose bleeding - MFI 6. I had a slight tear at my anus and it slightly bled.

Cross examination by accused

The blood stains on the trousers was from bleeding in my nose and not anus.

Re-examination Nil

When recalled for cross-examination by the appellant, PW1 said:

> *"PW1: Male Adult Duly Sworn States in Kiswahili I am JKK. I had testified earlier. Cross examination by accused Person On 13th June. 2017 you robbed me. The phone was in my jacket pocket. Nobody witnesses the incident. I was found at the scene the following day. It's you who robbed me and raped me. I saw you at the time of robbing me. It was at night. We left the bar at 10:30pm and as I waited for a motorbike you attacked me. I don't know the time you got home. You came and asked me for a cigarette I wasn't drinking beer with you but I can't tell who else was there because there were many people in the bar. Bernard found me early in the morning and I told him to help me. He gave me tea and chapatti before taking me to hospital. Eldama Ravine Nursing Home is a private hospital and that's where I was given 1st aid. My whole body was weak. Court Prosecutor in re-examination I left the bar at 10:30pm and sat outside smoking. When the accused came I continued sitting with him for fifty minutes as we shared a cigarette to one hour.*

I can confirm that the accused is the one who robbed and raped me. There's security lights outside the pub (an electricity) Bulb was shining on the veranda less than two metres from where the accused person and I were. The bar had been closed. I had been seeing the accused for over a month before the incident so he wasn't a stranger to me. I saw his face by aid of electricity light as we shared a cigarette. I went to a private hospital because the public doctors were on strike. The accused robbed of my phone and they were recovered in his house. t had taken two bottles of pilsner so t wasn't drunk. t was tipsy.

PW2 – Bernard Lang'at Rotich testified as follows:

I come from Sigowet and I am a potato vender. On the morning of 13th June, 2017 I do recall at 7:00am I was taking women to dig out potatoes at the shamba at Boito and some women selling potatoes called me saying someone had fallen at Jubilee bar at the verandah and that I go check and I went and found out it was JKK whom I used to know as a friend. I found him asleep but sat and bending his head but had fallen asleep. We woke him up by calling his name and I decided we give him tea first as he was shivering.

There was blood at the verandah down where he was sat as well as his clothes and blood on the nose. He had blood stains on his jacket on the front side and I cannot recall exact trouser he was wearing. ***After taking tea we asked him what happened and he told them he was beaten and robbed two phones and Ksh.455 and he was raped and that it was Gilbert who had done that. He said it was that man who usually stitches potato sacks and described him and when I returned the name Gilbert he confirmed.*** *Together with the sister we took him to Timboroa hospital then referred to Eldama Ravine District Hospital but I did not accompany them. Later I heard the phones were recovered at Gilbert friend one Kipchoge where Kipchoge had slept. I later recorded my statement at the Police Station on the same date later in the day and it was one Siele Kipkemoi owner of the bar who told me we go to Timboroa Police Station. Gilbert was then at the Police Station. I used to know Gilbert as we work together and he stitches sacks for potatoes and he is the one in court.*

Cross examination by the accused

I found you already arrested at Timboroa Police Station while taking PWl to hospital I did not hear if you had been arrested. When we went to Timboroa Health Centre we found the doctors were on strike and we went to private nursing home and he was only given pain killers and referred to Eldama Ravine District Hospital. Its women selling potatoes who called me \IJ saying there was someone fallen at the verandah and I went to call out his names. I am not sure if he could have seen other passers-by before I came.

Re-examination

We first went to Timboroa Health Centre where doctors were not present then went to nursing home which is near it. After women called me I went and found PW1 asleep and I woke him up.

PW2 was recalled for further cross-examination when he said as follows:

"I am Bernard Rotich. I had testified in this case.

Cross examination by accused person

I was the Good Samaritan. I took JKK to Timboroa Hospital. I don't have his treatment documents. Hon. J. Nthuku - SRM Court Prosecutor: No re-examination."

PW3 Village elder Zakayo Tito Shivasi testified as follows:

> *I stay in Boito trading Centre. I am a businessman. I sell potatoes. On 13th June, 2017 at 8:00am I was called by a resident of Boito saying that a person had been beaten and raped. He was lying outside Tree top Bar. He was bleeding. I am the village elder. At the scene I found many people who had arrested Gilbert (the accused person). I was informed by the mob that he was the robbery and rape suspect. The bar owner had witnessed the crime. I called an AP officer to intervene because the mob wanted to burn Gilbert. Gilbert had a brown leather jacket and another pink/red jacket and black trouser. These are the two jackets. MFI 7 and MFI 8. Officer Tanui took him to Timboroa Police Station. I knew Gilbert before the incidence that's him (points). _ Court -Accused identified by the witness.*

Cross examination by accused person I know all villagers there because I am a village elder. You had stayed in that area for two months. The clothes were stained with blood and the complainant was oozing blood. I didn't take the complainant to hospital.

Prosecution No re-examination.

PW4, Philip Kevin Yator Medical Practitioner at Eldama Ravine District Hospital testified as follows:

> *I am a clinician officer specializing in reproduction health Registration No.4155 of COC. I have a Medical sheet for JKK 42 years old. It was filled on 13th June, 2017. On that day he was seen by my colleague but I reviewed him later and I filled the P3 form. He reported to have been attacked and sodomised on 13th June, 2017. He had bruises on face and neck and had pain passing stool. He said he was sodomised by a man known to him at 01:00 hours outside a bar where he was drinking. No condom was used during the sodomy. On anal exam he had fissures and bruises. Tests done were; ~ VDRL was negative ~ Urinalysis was negative ~ HIV test was positive and the patient was on ARVs. Anal swab on wet preparation showed non motile spermatozoa and many red blood cells and no pus cells. He had many epithelial cells evidence of trauma He was put on antibiotics and tetanus injection was given. I filled a P3 form for him and I produce it as an exhibit. I filled the P3 form on 13th June, 2017. PRC forms were also filled for the patient. The details are consistent with the ones in the P3 form and treatment card. I produce it as exhibit.*

1) Treatment chit exh.3

2) PRC form exh.4

3) P3 form exh.5

Cross examination by accused person

I examined you and found you were HIV negative. We placed you on Pre-exposure prophylaxis after examining you.

Court Prosecutor: *No re-examination.*

PW5: Kipkemoi Lagat, bar owner at Boito testified that-

> *I am a business man. I operate a bar called Jubilee Bar in Boito. On 12th June, 2017 at 10:30pm I closed my bar after telling all customers to leave. We locked ourselves inside me and Nancy to take stock. We stayed till 12 midnight and we left. I found Gilbert and JKK sitting next to the veranda smoking cigarettes. They were seated together and they are people known to me. I identified them by security lights of an electricity tube at the veranda and they were about 1 (one metre) away. I went home and slept. The following morning t found a missed call from my landlord Gilbert. He called again and told me to go to the bar immediately. I went with AP Tanui to the Bar entrance and found a group of people surrounding Gilbert who had been tied with ropes. They wanted to burn him. JKK was bloody and so was the verandah. I didn't find JKK at the scene but Public told me they had taken him to hospital because he had been raped. I took Gilbert to the Police station and they were taken to hospital while on the way Gilbert told the Police that the phones he had robbed Gilbert were in his house under a mattress. He led us to his house and he pushed the door open and under the mattress we found the two phones and escorted him to Timboroa Police Station. The phones were techno and Bird. They are in court (PMFI 1&2). Gilbert is I~ from Bomet but his uncle is from my area at Boito so I knew Gilbert. That's him. Court: Accused identified by the witness.*

Cross examination by accused person

I have known you for five years. JKK is a person who doesn't frequent the market. I left you sitted with JKK s smoking cigarettes. We took you to hospital and the doctor examined you.

Court Prosecutor*: No re-examination.*

PW6: Arresting Officer, No.2008076801 APC Kiprono Tanui of Hill Tea AP Post testified as follows:

On 13th June, 2017 at 9:40am the village elder Zakayo told me to go to Boito and rescue a suspect from angry members of public who wanted to lynch him. I proceeded to Boito and found the accused person herein surrounded by a large crowd. He had been tied with ropes. I rearrested him and we took him to Timboroa Police Station. That's the person I rearrested.

Court*: Accused identified by the witness.*

He was alleged to have raped a person. do not know. I was with members of public during the rearrest. I didn't know him before that day.

Cross examination by accused

I rescued you from irate mob. They would have killed you. I can't confirm you committed the offence herein.

Court Prosecutor: *No re-examination.*

PW7: Investigation Officer No.75253 CPL Caroline Kipkorir of Timboroa Police Station testified as follows:

I am the investigating officer in this case. I recall on 13th June, 2017 I was in the crime office when I received a report from JKK that he had been robbed of money and phone and raped by a person known to him. The accused was also brought to the station by AP officer from Hill Tea AP Post. I took the complainant to Eldama Ravine Sub-County Hospital together with the suspect and they were treated. I also issued a P3 form which was filled by the doctor. I recorded his statement. After taking the accused and suspect to hospital, I, PC Nderitu and Kipkemboi, the suspect led us to his house which he opened and showed us two phones hidden under the mattress. We recovered the same and the complainant identified them as his. We went back to the station and visited the scene, (Jubilee) bar and saw blood stains on the floor where the victim lay. The trouser of the victim was _ blood stained. It's in court. Shows black trouser with large blood stains - PMFI 6. Exh.6 22 I Page The accused was wearing this trouser which is blood stained (PMFI 9) exh.9. He also wore this pink jacket which has blood stains - PMFI 10 I produce it as an exhibit - exh.10 He wore two jackets the other is brown and has blood stains. I produce it as exhibit exh. 7. These are the two phones. I produce them as exhibit. Techno phone exh.l Bird phone - exh.2 –

The Bird phone has a missing button making it easy for the victim to identify it. I charged the suspect with this offence.

Court: *Accused identified by the witness.*

I didn't know him before.

Cross examination by accused person

I recorded my statement on 14th June, 2017. You wore two jackets because it was very cold. You had been beaten by members of public. JKK said he was raped and the same was confirmed by the doctor. I recovered the phones under your mattress in a house

you led us to. You were given pr - 10 exposure prophylaxis and I saw the medication.

***Court Prosecutor**: No re-examination."*

[14] When placed on his defence, the appellant confirmed his having been with the complainant at the alleged scene of crime in an unsworn statement as follows:

> ***"**DW1: I am Kipkoech Cheruiyot. I stay in Boito. I sell potatoes. On that day I went to collect potatoes and sold. The following day I didn't go to work. I met Kiprotich and he asked me why I sold the potatoes which he was interested in. He said I give him some money but I declined. He wanted to snatch my liquor and we fought then I went to a different bar leaving him in the bar he was drinking. At 10pm as I went home I met him at a corridor smoking a cigarette. He asked me why I didn't give him money. We disagreed and fought then I left him there and went to sleep. The following day he said I raped him and robbed him. That's all.**"*

Finding by the appellate court

Offence of robbery with violence

[15] As regards the offence of robbery with violence, there was proof of the ingredient of theft of the two mobile phones which properly identified by the complainant by description even though no purchase receipts or form IMEI numbers of the phones were given. Ownership of mobiles phones need not be proved by production of purchase receipts which owners may not retain for long periods after purchase or by technical IMEI numbers which phone owners do not care to record. Evidence that distinguishes a phone from others as belonging to the witness suffices; it could be by a name curved on the phone, a cracked screen or back cover, missing buttons in this case or other distinguishing feature. The circumstances of the recovery of the phones may also aid in the identification of the phones. The Phones were later recovered from the appellant's house on his leading the police.

[16] The evidence of PW2 who found the complainant at the verandah where he sat with blood on the floor, on his clothes and on his nose, and that of the clinical officer PW4 confirming the injuries "*bruises on face and neck*" established that the complainant had been beaten by his assailant. The fact of wounding of the complainant on the head, face and knees during the theft completed the offence of robbery with violence, however, modest the value of items stolen. Section 296 (2) of the Penal Code has the 3rd alternative ingredient as wounding, beating or striking which was proved on the evidence in this case and it is immaterial that it was a lone the assailant. See ***Olouch v. R*** (1985) KLR 549.

Identification of the appellant

[17] The complainant on being asked what had happened to him told first responder PW2 who had been alerted by women potato sellers "***he was beaten and robbed two phones and Ksh.455 and he was raped and that it was Gilbert who had done that. He saw it was that man who usually stitches potato sacks and described him and when I returned the name Gilbert he confirmed***". On the principle of cautious handling of identification evidence of a single witness in ***Maitanyi v. R*** (1986) KLR 198, there can be no question as to the identification by the weightier evidence of recognition (see ***Anjononi v. R*** (1980) KLR 59) of the appellant because the complainant's identification was not done in any difficult circumstances, the complainant having known the appellant by his nickname of Kimonda as a person who stitched potato sacks around Boito, the two having spent considerable time at the verandah together smoking between 10.30pm when the bar closed to the public to sometime after 12 midnight when (PW5) by the bar owner, who knew both the complainant and the appellant, after closing his bar upon stocktake found the two seated and smoking cigarettes at the verandah which was lit by security electric light tube. Moreover, the appellant confirmed his presence at the scene and having been with the complainant smoking at the verandah. In addition, the appellant was arrested by members of the public, a fact confirmed by the village elder PW3, the following morning after the complainant had told Bernard PW2, and his colleagues women potato sellers *'what had happened to me'*. The arrest by members of public was also confirmed by the Police Officer PW6 who had been called by village elder Zakayo PW3 and who confirmed the appellant as the person he had rearrested and rescued from an irate mob which sought to lynch him.

[18] The defence of the appellant that they had fought with the complainant for his failure to share proceeds of sale of potatoes with the complainant is belied by the fact that the appellant he led the police to recovery of the stolen phones from the appellant's house and by the medical evidence of the penetration of the complainant. It is immaterial that the house from which the stolen items were recovered was not shown to belong to the appellant having been the one who upon arrest led the police officers including PW7, not the arresting officer PW6 as submitted by the appellant, and the Bar owner PW5 and others to the house, which, in PW7's testimony "*the suspect led us to his house which **he opened and showed us two phones hidden under the mattress**. We recovered the same and the complainant identified them as his.*". The alleged fighting between the two could not have explained the theft and rape of the complainant.

Offence of Rape

[19] On offence of rape, the prosecution, medical evidence of PW4 showed that the complainant was penetrated as "*anal exam he had fissures and bruises …Anal swab on wet preparation showed non motile spermatozoa and many red blood cells and no pus cells …[and] many epithelial cells [being] evidence of trauma*". No consent could have been given in view of the injuries occasioned on the complainant, and consent as a defence was not raised. [The rape having been carried out on a man ought to have been charged as an unnatural offence c/s 162 of the Penal Code for which no consent could lawfully have been given as there is no provision for ***consensual*** sexual intercourse between male persons.]

[20] The defence admitted having been with the appellant and no doubt as to the robbery is raised in view of the recovery of the stolen phones from his house and the medical evidence proving penetration of the complainant without consent (lack of which is an ingredient in the offence of rape under the Sexual Offences Act though unnatural carnal knowledge is proscribed under the Penal Code) having regard to the use force and injuries occasioned on the complainant as established by medical evidence.

[21] For the reasons set out above, the court finds that the prosecution proved its case against the appellant for both the offence of robbery with violence c/s 296(2) of the Penal Code and rape c/s 3 of Sexual Offences Act, having established the necessary ingredients for each offence to the required standard of proof of beyond reasonable doubt.

Orders

[22] Accordingly, for the reasons set out above, the appellant's appeal from conviction is without merit and the same is dismissed.

Sentence

[23] However, on the sentence of death for robbery with violence c/s 296(2) of the Penal Code, considering that the sentence of death as guided by ***Muruatetu*** decision, supra, is a maximum rather than a mandatory sentence, and having regard the non-aggravated nature of assault on the complainant and the modest value of the items stolen, namely two phones valued at Ksh.1800/- and cash Ksh.455/=, and the fact that by accounts of both the complainant and the appellant the two had been drinking, and the appellant's responsibility may correspondingly have been diminished, the court finds a sentence of imprisonment for ten (10) years to meet the justice of the case with respect to retribution, rehabilitation and deterrence. **The sentence of death imposed on the accused for the offence of robbery with violence in Count I is set aside.**

[24] As regards the sentence of imprisonment for ten years for rape c/s 3 of the Sexual Offences Act, which is a minimum sentence for the offence, this court does not find any reason to interfere therewith save to direct that as the rape and the robbery with violence were committed as part of the same criminal transaction, **the sentence of imprisonment for ten (10) years for each offence shall be served concurrently,** and **the sentences shall pursuant to section 333(2) of the Criminal Procedure Code commence on 15th June 2017**, when the appellant was remanded to await his trial in the trial court.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF JULY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Muriu, Prosecution Counsel for the Respondent.