REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

APPELLATE SECTION

CRIMINAL APPEAL NO. 15 OF 2016

SIMON KIMITI DAVID.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 26 of 2014 at Principal Magistrate's Court at Kajiado presided over by Hon. M.O. Okuche SRM on 15/9/2015)

JUDGEMENT

The appellant Simon Kimiti David was charged with two counts as follows:

COUNT 1: The offence of robbery with violence contrary to section 296 (2) of the Penal Code with a brief particulars that on 1st day of January 2014 in Kajiado South District, in Kajiado County being armed with offensive weapon namely a panga robbed JNS of her mobile phone of make Nokia C-1 and a sim card all valued at Ksh.4,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said JNS.

COUNT 2: The charge of rape contrary to section 3(1) (a) (c) of the Sexual Offences Act No. 3 of 2006 and an alternative count of committing an indescent act with an adult contrary to section 11 (a) of the Sexual Offences Act No. 3 of 2006. The brief facts being that on the 1st day of January 2014 in Kajiado South District in Kajiado County intentionally and unlawfully caused his penis to penetrate the vagina of JNS.

The appellant had pleaded not guilty to the charges as indicted before the lower court. After close of the prosecution case and hearing the defence in answer to the charges the trial magistrate convicted and sentenced the appellant as follows:

> (i) On the offence of robbery with violence contrary to section 296 (2) of the Penal Code the appellant was sentenced to suffer death.
>
> (ii) As for the offence of rape contrary to section 3 (1) (a) (c) of the Sexual Offences Act the appellant was sentenced to ten years imprisonment. The ten years imprisonment was kept on abeyance.

Being dissatisfied with both conviction and sentence the appellant filed this appeal. The grounds of appeal are as follows:

(i) That the tenets of a fair trial were infringed when the appellant failed to get witness statements first report in advance of the hearing from the trial court.

(ii) That the learned trial magistrate erred in both law and fact by failing to find that the prosecution did not prove to the required standards that the prevailing conditions at the time were conducive for positive identification/recognition of the appellant.

(iii) That the learned magistrate erred in law and fact by failing to note that the witnesses were all coached and that investigations were done when the appellant had already been arrested.

(iv) That there was variance between the particulars of the charge and the evidence adduced in breach of the provisions of section 214 (1) of the Criminal Procedure Code.

(v) That the learned magistrate erred in law and fact by failing to find that the prosecution witnesses' narrations of evidence were unbelievable and a logical.

(vi) That the learned trial magistrate erred in law and fact in failing to find that the prosecution did not prove its case beyond reasonable doubt.

(vii) That the learned trial magistrate erred in law by rejecting the appellant's defence without assigning any good reason for doing so thereby contravening section 169 of the Criminal Procedure Code.

The appellant submitted and attacked the circumstances upon which the trial was conducted without being supported with witness statements.

In order to drive the point home on a violation of the right to a fair hearing, the appellant cited the following authorities; ***Republic v Daniel Chege Magotho [2014] eKLR, Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR, Morris Kinyalili Liema v Republic [2012] eKLR, Republic v Ward [1993] 2 ALL ER.***

The bone of contention was that the appellant was unrepresented and yet the information containing the indictment was not supplied to him prior to the trial. The appellant further argued and submitted that the circumstances prevailing at the trial on identification were not favourable. The principal witnesses the learned trial magistrate based his decision did not give a proper description how she was able to identify the appellant. In view that the witnesses could not explain why and how they identified the appellant left the evidence used to convict him unreliable and mistaken. He relied on the following cited authorities on the principles on identification; ***Republic v Eria Sebwato [1966] EA, Wanjohi & 2 Others v Republic [1989] KLR, Vincent Kingoo v Republic Cr. Appeal No. 98 of 2014, Kiarie v Republic [1984] KLR 739, Roria v Republic [1967] EA 583, Republic v Turnbull & Others [1976] 3 ALL ER 549.***

The appellant further contended that the elements of the charges were defective for reasons of being at variance with the evidence adduced by the prosecution. The learned trial magistrate therefore erred for not causing the amendment of the charges as required under section 214 (1) of the Criminal Procedure Code. In support of the legal proposition on defective charge the appellant relied on the case of ***Yongo v Republic [1983] KLR 324.***

The appellant's other complaint was con-consideration of his alibi defence by the trial court. He placed reliance on the following cited authorities; ***Sekitoleko v Uganda [1967] EA 531, Leonard Aniseth v Republic [1963] EA 206, Karanja v Republic [1983] KLR 501***. In his view the evidence against him fell short of the standard of proof of beyond reasonable doubt to sustain a verdict of guilty and a conviction as arrived at by the learned trial magistrate.

Mr. Akula, the learned senior prosecution counsel filed written submissions opposing the grounds of appeal touching on the orders of conviction and sentence against the appellant. Mr. Akula further submitted that this court should evaluate the evidence of the six witnesses at the trial and could arrive at a

conclusion that all the elements of the two counts were proved beyond reasonable doubt. Mr. Akula further contended that for the offence of robbery the prosecution proved that the appellant was armed with a dangerous weapon, secondly that the appellant was positively identified as participating in the robbery against the complainant. Mr. Akula further argued that it was during the robbery that the complainant was robbed her mobile phone. Learned counsel further submitted that the evidence of PW1 points to the acts of rape committed against her by the appellant without her consenting to the sexual assault. The following cases were cited; ***Bisonga v Republic [2014] eKLR, Chiro Sonje Mbaga v Republic [2008] eKLR, Simon Ndungu Kinuthia v Republic [2016] eKLR, Mneni Ngumbao v Republic 141 of 2005, Peter Mwanzia v Republic [2008] eKLR, Republic v Turnbull [1976] 3WLR 445.*** Mr. Akula armed with the principles in the above cited authorities urged this court not to disturb the judgement by the trial court on both conviction and sentence.

This being the first appeal, it is paramount that the evidence be considered, evaluated and an independent conclusion reached as to whether the conviction and sentence should be affirmed. These principles are well enunciated by the East African Court of Appeal in the case of ***Pandya v Republic [1957] EA 336 pg 37***. See 1985 Volume 1 pg 103:

> **"On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials at it may have decided to admit. The appellant court must then make up its mind not disregard the judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on a manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses but there may be other circumstances, quite apart from manner and demeanour which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen……"**

It is therefore necessary at this stage to give a brief account of the evidence that led to the appellant being convicted of the two counts. The prosecution case at the trial was projected as follows:

In the testimony of PW1 JS on the 1/1/2014 at 6.30pm she was walking home when a man armed with a panga confronted her and inflicted bodily harm to the neck and left hand. PW1 further told the trial magistrate that the same man pulled her into the maize plantation, undressed her and forcibly had sexual intercourse. According to PW1 the man later robbed her of a mobile phone described as Nokia C-1, the SIM card together with memory card. The first person PW1 informed of the ordeal was her mother PW2 – SS. According to PW2 on the material day she learnt from PW1 that she has been raped. The first action by PW2 was to call for help from her neighbours to assist in tracing the culprit.

In response to the distress call PW4 George Somoire rushed to PW2's home to verify the nature of the problem. On arrival at PW2's home it was PW4 evidence that he observed PW1 bleeding from her left hand. PW4 further told the trial magistrate that PW1 complained of being raped by the assailant.

As PW2 and PW4 had the description of the suspect from PW1 they proceeded to the scene with sole purpose of tracing and apprehending him in the event he has not taken flight. In the evidence of PW2 and PW4 fortunately they came into contact with the appellant whom they arrested and escorted to Entarara police post. PW4 was further to confirm to the trial magistrate that a phone battery was recovered from the appellant and the panga which allegedly used at the time of the robbery was still in his possession. When PW1 was shown the clothings the appellant wore at the time of the incident she positively identified them before the trial court. At the same time PW1 gave a description and identifying mark in the recovered phone battery as the one stolen from her by the appellant.

PW3 Dr. Stephen Mutiso gave evidence on behalf of his college Mr. Mutunga who had examined and filled the P3 form in respect of PW1. The P3 and the medical notes from the evidence of PW3 revealed

that PW1 sustained visible bruises of the lower part and outer vaginal wall. PW3 further deposed that PW1 suffered maim to her left index finger.

PW6 APC Mutai attached to Entarara AP post confirmed that on 1/11/2014 he received the appellant from the members of the public as a suspect of robbery and rape. PW6 further told the trial magistrate that the phone battery and the panga recovered from the appellant were handed over to them for further investigations.

This matter was then investigated by PW7 Cpl Gabriel Matata. PW7 evidence at the trial court was the recording of witness statements and exhibits including the P3 form which formed a basis to indict the appellant with the offence of robbery and rape against PW1.

The appellant in his defence denied the offence and raised an alibi in answer to the identification and presence at the scene. This alibi defence was also supported by the evidence from DW2 Catherine Wangari and DW3 – Susan Wambui. At the hearing of the appeal the appellant reiterated the grounds of appeal and urged this court to quash the conviction and sentence.

I have considered the trial court record more specifically the extract of the judgement subject matter of this appeal. The appellant was charged and convicted of the two counts namely; robbery with violence contrary to section 296 (2) of the Penal Code and secondly, rape contrary to section 3 (1) (a) (c) (3) of the Sexual Offences Act No. 3 of 2006. The appellant against convictions on count 1 and 2 ought to be considered around the question whether the prosecution proved the case beyond reasonable doubt to warrant affirmation of the lower court decision.

> **(1) I will therefore start with an evaluation of the charge of robber contrary to section 296 (2) of the Penal Code.**

The offence under section 296 (2) of the Penal Code is deemed to have been proved beyond reasonable doubt if any one of the following elements exists:

> ***(a) That the offender is armed with any offensive weapon or instrument.***
>
> ***(b) That the offender in company with one or more other persons; or***
>
> ***(c) At the; or immediately after the robbery the offender wounds, beats, strikes or use other personal violence to any other person.***

The question this court must determine therefore is in respect of whether any of these elements was proven by the prosecution as required by law for the trial magistrate to have convicted the appellant.

The gist of the arguments advanced by the appellant was that the identification evidence fell short of circumstances which the complainant would have recognized him positively. The basis of the appellant's submissions was that there was no eye-witness to the crime. On the other hand the prosecution urged this court to place reliance on the testimony of PW1 and corroboration evidence on the doctrine of recent possession.

The requirement to be met in a case dependent on identification/recognition has long been settled in our courts. In this light I have in mind the decision in the classic authority of ***Republic v Turnbull & Others [1976] 3 ALL ER 549*** **Lord Widgery C.J:**

> **"First, whether the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications.**
>
> **In addition, he should instruct then as to the reason for the need for such a warning and**

should make some reference to the possibility that a mistaken witness can be a convicting one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?....”

The Court of Appeal taking a queue on the principles in the ***Turnbull case*** has held in a plethora of cases that courts can competently convict on cogent and reliable evidence of a single identifying witness. A sample of such authority reveals the following in the case of ***Simiyu & Another v Republic [2005] 1 KLR 192*** the Court of Appeal held thus:

“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given.”

The same court in the case of ***Maitanyi v Republic [1986] KLR 198*** held:

“The strange fact is that many witnesses do not properly identify another person even in day light. It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into…”

(See also ***Wanjohi & Others v Republic [1989] KLR 415***).

The jurisprudence around these authorities is that for the evidence of a single identifying witness to be used to warrant a conviction, the witness must allude to the opportunity and favourable conditions which made positive identification possible. The second cardinal principle is that visual recognition must be free from any errors or mistake. This was revisited by the Court of Appeal in the case of ***Paul Etole & Another v Republic Cr. Appeal No. 24 of 2008 UR***. The court observed:

“Evidence of visual identification can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence.”

In the present case PW1 stated that she was attacked; raped and robbed on or about 6.30pm on the material day. PW1 further gave the description of the appellant to PW2 which involved the nature of clothing and his missing tooth. This issue was carefully considered by the trial court.

I have on my part subjected the same evidence to a further review. From the record the incident took place at 6.30pm. The appellant not only did he rob the complainant but also sexually assaulted her on the same date and time. It is not in dispute that 6.30pm the available light conditions one is able to see the face and other physical features particularly one who has spent considerable time like the appellant. PW1 evidence clearly established the missing tooth and the clothes worn by the appellant. With the above information PW2 and PW4 rushed to the scene and managed to apprehend the appellant when PW2 and

PW4 escorted the appellant to the police post. PW1 was later to confirm that he was the one who stopped her, committed the unlawful acts of robbery and rape.

The appellant challenged his identity by raising an alibi defence. It is trite that an accused who pleads alibi as a defence assumes no burden to proof it. ***(See the case of Leonard Aniseth v Republic [1963] EA 206, Karanja v Republic [1983] KLR 501)***. The defence of alibi means the accused was elsewhere than the purported scene of crime. In ***Republic v Sukha Singh & Others [1939] 6 EACA 145*** the court held:

> **"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."**

The Supreme Court of Nigeria dealing with the same principle on alibi defence in the case of ***Patrick Njovens v The State [1973] ALL NLR 371,*** held *inter alia:*

> **"There is nothing extra ordinary or esoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempts to do so, there is no inflexible and/or invariable way of doing this if the prosecution adduces sufficient and accepted evidence of crime at the material time surely his alibi is thereby and physically demolished."**

On considering all the various matters which I have set out to which the appellant referred to on this ground and learned counsel submission, the conclusion I draw is that the evidence by PW1 on visual recognition was cogent, reliable and free from error. The appellant was arrested few hours after committing the offences. He was armed with the same panga produced as exhibit 9. The complainant PW1 gave the description of the clothes the appellant was wearing. PW2 and PW4 arrested the appellant wearing the same clothing. According to PW1 she positively identified the clothes produced as exhibit 2, 3, 4 and 6. It was also confirmed by PW1, PW2 and PW4 that the appellant had a missing tooth.

In the appellant's submissions on appeal and his defence at the trial, none of these facts were controverted to distort the prosecution case. The trial court had also in their possession evidence on recovery of mobile phone battery exhibit 1. The complainant in her evidence at the trial gave the description of identifying the battery before court. She further stated at the trial court that she was robbed of the mobile phone together with the battery. PW1 deposed of a specific mark to differentiate it from other normal phone batteries. This evidence was accepted by the trial court.

The Court of Appeal has settled this issue on doctrine of recent possession in the case of ***Isaac Nganga Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005*** in the following passage:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

The view I take of this matter is that the trial court had sufficient evidence on recognition from PW1 to place the accused at the scene. I also agree with the evidence on the doctrine of recent possession on the recovery of the mobile phone battery which PW1 identified as the one stolen from her on the day of the robbery. The appellant did not attempt to give an explanation regarding his possession of the mobile phone battery belonging to PW1.

I further find that the testimony of the appellant and the two witnesses did not dislodge the direct and circumstantial evidence tendered by the prosecution witnesses. The appellant did not give a detailed account of the time he went for the funeral meeting. Additionally, PW2 and PW4 told the trial court that they arrested the appellant whom they escorted to Entarara police post. This evidence is corroborated by PW6 who received the appellant accompanied by PW2 and PW4.

The evidence as submitted by the appellant and his witnesses does not in any way cast doubt on the prosecution case. The finding of trial magistrate that the appellant's defence weighed with the circumstances of his arrest leaves their version improbable. The appellant could not be at the funeral and at the same time under arrest in the hands of PW2 and PW4. The plea of alibi was therefore demolished by the prosecution case.

(2) The second issue on the appeal is whether the learned trial magistrate firmly established the essential ingredients of the offence of rape contrary to section 3 (1) (a) (c) (3) of the Sexual Offences Act.

In our jurisdiction a sexual assault charge can be proved beyond reasonable doubt solely with credible evidence of the victim. Without corroboration the essential elements of rape consist of the following:

(1) The act of intentional and unlawful penetration.

(2) The act of sexual intercourse was done and against the complainant's will.

(3) The consent is obtained by force or by means of threats or intimidation.

I have considered the record in respect of this charge. At the appellant's trial, PW1 adduced evidence to the effect that on 1/1/2014 while walking home she met the appellant. A few minutes later according to PW1 the appellant who was armed with a panga assaulted her and forcibly dragged her into the maize plantation. In a twist of events PW1 testified that the appellant tore her clothes including the inner wear before removing his penis and inserted it forcibly into her private parts and committed forced sex. The ordeal, which lasted for twenty (20) minutes occasioned penetration and actual bodily harm.

The first point of call was a report to PW2 who observed the nature of injuries complained of by PW1. The mother PW2 besides seeking police assistance did escort PW1 to be examined by PW5 John Mutunga a clinical officer at Loitokitok Hospital. The P3 containing the examination details and the medical notes produced as exhibit 8 and exhibit 10 revealed the following:

That PW1 sustained maim and also injuries to the genitalia. The medical evidence confirmed that the complainant had been raped. The appellant was arrested by PW2 and PW4 and later charged with the offence. The trial magistrate evaluated the evidence and dismissed the alibi defence by the appellant. As a result of the outcome of the trial the learned magistrate found the appellant guilty as charged and convicted him to 10 years imprisonment.

I have subjected the entire evidence on record to a fresh scrutiny to establish whether the offence was proven beyond reasonable doubt. I am satisfied that there is evidence of sexual intercourse against PW1. The medical evidence by PW6 corroborates that there was penetration necessary to constitute sexual assault. The findings from the P3 indicate damage to the private parts of PW1.

Secondly, the complainant was forcibly dragged into a plantation and unlawful sexual acts committed by the appellant. According to PW1, her clothes were torn, most specifically the inner wear to enable appellant gain entry to the private parts. The torn clothes were exhibited as proof of forced penetration. It is also not in dispute that prior to the rape the appellant assaulted the complainant with the panga which was recovered and produced as exhibit 5.

As regards participation of the appellant the prosecution admitted direct evidence from PW1 and further circumstantial evidence from PW2, PW4. The two witnesses PW2 and PW4 arrested the appellant

immediately after the sexual assault. He was escorted to the police station where he was rearrested by PW6 APC Mutai.

I have carefully considered the evidence on record. I am of the holding that the trial court arrived at a right decision in finding that the appellant was guilty of rape. I therefore find the ingredients of the offence of rape provided beyond reasonable doubt against the appellant.

(3) The other ground put forward by the appellant is about the ingredients of his rights to a fair trial as regards supply of witness statements in advance of the hearing.

This right is enshrined under Article 50 (2) (a) of the Constitution where the accused person has a right to be informed of the charge, with sufficient detail to answer it. The superior courts have echoed in several decisions that the right to be informed of the charge with sufficient details is so fundamental and the state cannot derogate from unless exceptional circumstances have been demonstrated to withhold it.

In ***Juma & Others v A.G. [2003] EA 461*** the court held *inter alia*:

> **"We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This included in the package of giving and affording adequate facilities to a person charged with a criminal offence."**

I have perused the trial court record during the plea taking on 13/1/2014. The court made an order that the accused person be supplied with the witness statements. On 5/3/2014 the trial court made an order that he be supplied with witness statements. This court record further reveals that when the charges were substituted and the charge read to the appellant on 12/3/2014 an order was made for the supply of witness statements. The matter proceeded for hearing until the 30/7/2014 when the appellant applied to be supplied with the investigation officer's statement and OB extract. The trial magistrate adjourned the hearing pending issuance of the statement to the appellant. In my view there is ample evidence that the trial court was alive to this right to a fair trial under Article 50 (2) (c) of the Constitution. This is demonstrated by the order of granting an adjournment so that the O.B extract and investigations statement could be availed to the appellant.

I have no reason to hold that the trial of the appellant proceeded without being supplied with witness statements. This is one case where the appellant seemed to be aware of his constitutional right to information on indictment. The orders in the court record cannot be assumed to have been blatantly ignored by the court by the proceedings with the trial in absence of compliance. I therefore find no credible evidence to rule in favour of the appellant. This ground therefore fails.

(4) The appellant further complained of the defective charge sheet.

According to the appellant the charge sheet presented by the prosecution consisted of in accuracies and deficiencies that failed to disclose an offence contrary to section 296 (2) of the Penal Code. The appellant submitted that the failure to amend the charge is, in contravention of section 214 of the Criminal Procedure Code which ultimately occasioned prejudice and injustice. He relied on the cited authorities of ***Yongo v Republic (Supra)***. The respondent counsel in a rejoinder objected to the appellant's submissions that the insufficiency in respect of the use of words ***"used actual violence is not a fundamental defect."***

My view on this ground is guided by the dictum in the case of ***Bisonga v Republic [2014] eKLR*** where the court observed that:

> **"In *Alivi v Republic [1990] KLR 188* it was held that it is not every defect or omission that constitutes a charge defective and it has been held many a time that a mere technical defect in the charge sheet which is not fundamental and does not cause a failure of justice is curable. In *Kilome v Republic [1990] KLR 194* it was held that the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the**

charge sheet."

In the instant case I have analysed the particulars of the charge sheet. The set of circumstances particularized against the appellant are that, ***"on the 1st day of January 2014 at in Kajiado, being armed with offensive weapon namely a panga robbed JNS of her mobile phone of make Nokia S-1, SIM card all valued at Ksh.4,000 and immediately before or immediately after the time of such robbery threatened to use actual violence to JNS."***

My understanding of the ingredients of the offence under section 296 (2) of the Penal Code, the use or threat to use actual violence is one of the elements to be proven by the prosecution against the accused.

From the foregoing therefore the appellant was armed with a panga produced as an exhibit in this case. The panga was used to threaten the complainant and indeed in the course of the threats PW1 suffered injury to the index finger. This wounding of the complainant was done before the stealing and subsequent rape against the complainant.

My reading of the charge sheet is such that it enabled the appellant to understand the charge against him and the nature of his conduct that constitutes the offence. I do not agree with the interpretation by the appellant that there has been prejudice or a fundamental defect which did not disclose the offence he faced at the trial court. This ground of appeal on the defective charge sheet therefore fails.

Having considered all the relevant issues raised by the appellant I am satisfied that the requirements of the offence or robbery with violence contrary to section 296 (2) of the Penal Code and that of rape contrary to section 3 (1) of the Sexual Offences Act are therefore present in this case. The trial court had sufficient material to establish the case beyond reasonable doubt against the appellant.

I therefore uphold the conviction of the lower court on both counts. As concerns sentence I want to point out that I find no evidence that the learned trial magistrate acted on wrong principle or that the sentence passed is manifestly excessive or disproportionate to the offence. (See ***Ogalo v Republic [1954] 24 EACA 270***).

Accordingly the appeal is hereby dismissed in its entirety. The judgement of the lower court is hereby affirmed.

Dated, delivered and signed in open court at Kajiado this 19th day of April, 2017.

…….

R. NYAKUNDI

JUDGE

In the presence of:

Appellant present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli Court Assistant