



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 5,7 & 9 OF 2014

HARRISON KARIUKI MWANGI1st APPELLANT
KENNEDY OTIENO JUMA.....2nd APPELLANT
JOSHUA OMOSA NYANGAU.....3rd APPELLANT

VERSUS

REPUBLICRESPONDENT

**(Being an appeal from the original conviction and sentence in the Chief's Magistrate's Court
at Kibera Cr. Case No. 5087 'B' of 2009 delivered by Hon. Onyina (Ag. SPM) on 2nd December,
2013).**

JUDGMENT

Background

The three Appellants were the 1st, 2nd and 3rd accused persons respectively having been charged alongside others with various counts. In counts I, II, III, IV, V, VI and XI, they were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The complainants were Valerie Ann Leakey, CCS, John Clifford Adam, Susan Patricia Perrow Adam, Lessa Adeline Dane, Peter John Dane and Peter Imbeji Hanumba respectively. Each of them was robbed of various items on 31st March, 2006 at Masaai Lodge Area in Ongata Rongai Kajiado District within the then Rift Valley Province. In addition, in counts VII, VIII, IX and X, they were charged with rape contrary to Section 140 of the Penal Code. The 1st appellant was charged in counts VII and IX and it was alleged that he had canal knowledge of CCS and M C without their consent. The 2nd Appellant was charged in count VIII for having canal knowledge of CC without her consent whilst the 3rd Appellant was charged in Count X for having raped MC.

For reasons that would be stated in this judgment, all the counts except Count II flopped for which the Appellants were convicted and sentenced to death. Their co-accused who were the 4th and the 5th accused persons were acquitted under Section 210 of the Criminal Procedure Code for want of sufficient evidence to put them on their defence. In Count II, for which the Appellants were convicted, the particulars of the

offence were that on the 31st day of March, 2016 at Maasai Lodge Area in Ongata Rongai in Kajiado District of the Rift Valley Province, jointly with others not before the court while armed with dangerous weapons namely pistols, pangas and knives robbed CCS one digital camera, one laptop make Toshiba, one mobile phone make Nokia, one Hi-fi system make Sony, one gold silver watch, one black band watch, one and Rober jack and assorted personal artifacts al valued at Kshs. 1,300,000/= and at or immediately before or immediately after the time of such robbery used actual violence to he said CCS.

They were sentenced to death. They were dissatisfied with the conviction and sentence and they preferred this appeal. A supplementary Petition of Appeal was filed for the 1st and 2nd Appellants which set out a substantial number of issues for determination which ultimately constituted the grounds of appeal. They were:

- 1. Fair trial was not accorded to them.**
- 2. Their identification was not free and fair.**
- 3. The circumstantial evidence relied upon had not met the standard of proof required.**
- 4. That the charges framed were defective.**
- 5. That they were prejudiced when an amendment was allowed to the charge sheet.**
- 6. That PW1's evidence was taken in a manner that defeated the basic tenets of a fair trial.**
- 7. That material contradictions and inconsistencies littered the evidence adduced.**
- 8. That the facts were misapprehended and wrong legal principles applied by the trial magistrate amounting to a miscarriage of justice.**
- 9. Charges were not proven beyond reasonable doubt.**
- 10. The Appellants' defences were not considered.**
- 11. That the trial court was not an impartial and independent arbiter.**
- 12. The commercialization of the case was prejudicial to the Appellants.**

The 3rd Appellant in his submission raised the following issues for determination:

- 1. Whether the learned magistrate erred in law in finding that there was a proper identification parade.**
- 2. Whether the learned magistrate erred in law in holding that the Appellant was positively identified.**
- 3. Whether the magistrate erred in law by convicting the Appellant based on irregularities committed during the identification parade.**
- 4. Whether the magistrate erred in law in convicting the Appellant in total disregard of the fact that the prosecution did not prove its case beyond reasonable doubt.**
- 5. Whether the learned magistrate erred in law in failing to totally evaluate the evidence on record and hence arriving at a wrong decision.**
- 6. Whether the learned magistrate erred in law in imposing an unlawful and unconstitutional**

sentence.

SUBMISSIONS

The 3rd Appellant, who was the 3rd Accused in the original trial was represented by Senior Counsel, Dr. Khaminwa for Khaminwa and Kwaminwa Advocates and Mr. Ondieki for Ondieki and Ondieki Advocates represented the 1st and 2nd Appellants, who were the 1st and 2nd accused respectively. During the hearing, the two counsel jointly represented the Appellants. Learned counsel Mr. Ondieki argued the appeal on points of evidence whilst learned counsel Dr. Khaminwa argued on points of law. They each filed their written submissions and were granted a chance to highlight the same. The Respondents was represented by learned State Counsel, Ms. Aluda who also filed written submissions and was also granted a chance to highlight the submissions.

Written submissions as set out and highlighted by Dr. Khaminwa did not explore or canvass all the grounds as set out in the Memorandum of the Appeal although they did seek to rely on it in so far as it conformed or did not contradict the submissions. He submitted that when the case was withdrawn under Section 87(a) of the Criminal Procedure Code it was primarily as a way of denying the Appellants their right to a fair hearing and ensure that the fact that the file had started four times de novo a conviction was secured. He also submitted that two of the complainants, CCS and Valerie Leakey had given descriptions of two assailants in an initial report to the police station which report was not availed in court. He further submitted that the failure to call CPL Mwangi from Kilimani Police Station was detrimental to proving the link of the 3rd accused to the offence.

It was submitted that the doctrine of recent possession could not be used to connect the laptop stolen from CCS and was produced as MFI 3 to the Appellants and as such could not be relied upon to connect them to the offence the Appellants were convicted for. He submitted that the 1st Appellant's alibi defence had not been considered to his detriment and this ultimately infringed on his right to fair hearing. He relied on **SEBA VS REP[2010] 2 EALR**.

Further they submitted that the identification that had been relied on was mostly dock identification which had the effect of shifting the burden of proof to the accused person as set out in **MBURU & ANOR VS REP[2008] KLR 288; ALLEN VS DPP[2014] EALR 138(Court Of Appeal of Tanzania)**. He further submitted that the failure of pre-trial identification rendered the identification untenable and unreliable as set out in **CYRUS NANGUKO & ANOR VS REP[2014] e KLR; SIMUYU & ANOR VS REP[2005] 1KLR192** and **GITHUKU VS REP[2012] 2EALR 152**. He further submitted that the failure to provide identification witnesses to provide the description of the assailants was evidence of the fact that the identification was unreliable and ought to have been excluded. He further submitted that if the evidence on identification had to be admitted it should have been submitted after the court had warned itself that it could potentially be mistaken.

Learned Counsel went on to submit that the fact that the identification evidence could be corroborated by other corroborative evidence that evidence must itself be admissible ab initio. He submitted that the only description of the accused was from PW1, CCS. He relied on cases of **NJIHIA VS REP; Police Standing Orders 6(n)**. He submitted that the only identification parade conducted on his client that was found to be in conformity with the standing orders was the one in respect of PW2. He submitted that the purpose of identification parades was to test the veracity of the witnesses' assertions that the accused was at the scene of the crime. He faulted this parade in that some of the witnesses did not make positive identifications of the Appellants, that there were similar members of the parades constituted, that there was an assertion of conversation between the witness(The case of **FINLEY[1993] CRIM L. R 50** was cited) and finally that members of the parade did not conform to the requirements set out for an identification parade as set out in **WAMUNGA VS REP[1989] KLR424**.He therefore opined that there had been no identification evidence that was reliable. The case of **SAMUEL KIMENYU MBUTHI & ANOR VS REP(Crim. App 44 of 2015** was also cited.

Learned counsel also submitted that the trial magistrate had been exasperated by the long and convoluted history of the case and had played to the choir in convicting the Appellants. Further, that there was a

failure to call crucial witnesses in the case specifically CPL Mwangi who was an arresting officer. He relied on **BUKENYA VS UG[1972] EA 549**.

Finally, counsel submitted that the death sentence imposed was unconstitutional. He relied on the case of **MUTISO VS REP[2011] EALR**.

The submissions by learned counsel, Mr. Ondieki for the 2nd and 3rd Appellants were that the trial was conducted in an unprocedural manner by allowing the same to be filmed. He submitted that allowing the cameras to film the proceedings by the Chief Justice was a 'directive to convict.' He further submitted that the Appellants were not furnished with the first report of the crime as requested for during the trial thus hindering their ability to mount a proper and sound defence. It was his submission that the prosecution was allowed to amend the charges at very late stage to the detriment and prejudice of the Appellants. Learned counsel urged the court to disregard the evidence of PW1, CCS which termed as unreliable and not credible. He further submitted that the evidence of identification was not free of any possibility of error given the fact that the rules of identification parades had been violated. He faulted the prosecution's case as being laced with material contradictions and inconsistencies. Finally, that crucial witnesses were not called as set out in **Somaia vs Regina**.

He also relied on the following authorities: **RAPHAEL VS REP[1973] EA 473, KIARIE VS REP[1984] KLR 739, KARANJA & ANOR VS REP[2004]KLR140, MARY WANJIKU GICHIRA VS REP(Cri. Appeal No. 17 of 1998, Court of Appeal @ Nairobi), ALBANUS MWASIA MUTUA VS REPUBLIC(Criminal Appeal No. 120 of 2004, Court of Appeal @ Nairobi), OKETHI OKALE & OTHERS VS REP[1965] EA 53, MORRIS KINYALILI LIEMA VS REP[2012] eKLR , REBECCA MWIKALI NABUTOLA VS REP[2012] eKLR and HENRY ODHIAMBO OTIENO VS REP[2006] eKLR.**

On behalf of the respondents Learned State Counsel, Ms. Aluda conceded to the appeal. She submitted that the fact that the Appellants were not found in possession of any of the stolen items and the fact that the Appellants were arrested at different places meant there was a likelihood of mistaken identity. This, she submitted was further attested by flawed identification parades. She however dismissed all the other grounds of appeal. She therefore prayed that the conviction be quashed and Appellants be set free.

EVIDENCE.

The prosecution's case was that on 31st March, 2006 the Appellants together with others not before the court gained entry into the estate of Valerie Leakey and held custody Valerie Leakey, C.C.S(PW1), M.C(PW 4), Joseph Mwirigi Thuemka, Giriama, John Clifford Adam, Susan Patrick Perrow Adam, Peter John Dane, Lessa Adeline Dane, Elizabeth, Francis Waweru Ndungu, Mbai Kisenge Kamula among others and in the process committed the offence of robbery with violence against Valerie, CCS, Susan Patricia Perrow Adam, Lessa Adeline Dane and Peter John Dane. There were also acts of rape committed against C.C.S and M.C.

It was their case that the offences were committed from about 9.00 am to about 5.00 pm in and around the Maasai Lodge Area. The matter had begun de novo seven times for various reasons including the loss of the court file, the fact that some of the counts had been overtaken by events as the complainants were either dead (Valerie Leakey) or had left the jurisdiction, namely complainants 3 to 6 and the transfer of trial magistrates.

PW1, C.C.S testified before Nyakundi P.M on 20th September 2011. The proceedings were to take place in camera due to the sexual offences that had been charged but she waived this right in order to have the proceedings video recorded. She got permission to record them from the Chief Justice and the trial court allowed the recording. Only persons related to the Appellants were allowed in the gallery.

She testified that in 2006 she was living at Maasai Lodge Area in a 2 bed roomed cottage within Valerie Leakey's property. She recalled that on 31st March, 2006 she had left the house at around 8.20 am and went to Kawangware specifically Riruta Health Clinic where she worked. She came home earlier than

usual, around 10- 10:30 am. She found the gate to the compound locked. The gate was in an isolated location and although no formal fence existed the area was demarcated by bushes and other shrubbery. She got out of her car and opened the gate before driving up the drive way to her cottage.

She found Mrs. Leakey's car reversed into her drive way which she found odd. She therefore got out and walked towards the entrance of the cottage walking around Mrs. Leakey's car at which point she started making out what appeared to be male voices emanating from the cottage. When she got to the cottage she found the security grill open which was also odd as she had left it closed. She then opened the door and stared down the hallway but it appeared empty. The layout of the house was such that the first door on the right led to a bathroom followed by a second door to her bedroom. Opposite her bedroom was a bedroom that belonged to an American man who was away. As she peered down the hall a short man emerged from the bathroom. She identified this man in court as the 3rd Appellant Joshua Omosa Nyangau. He was wearing a warm looking puffed up black jacket and had a cap on. He was not armed but she was still surprised to see him as she did not know him. As they were staring at each other a tall man with a yellow cap emerged from the American's bedroom. Simultaneously, a third strong looking man wearing a black leather jacket emerged from the bedroom on the other side.

One of the men pulled a pistol from his waist band and pointed it at her while yelling at the other men something she did not understand. She instinctively tried to shut the door as the short man was bearing down on her. They tussled over the door as she tried to lock it and the men inside tried to open it. Given their numbers she let the door go. She jumped back in an attempt to avoid being captured but it was futile as the man in the black jacket and the one in the yellow cap got hold of her. The 3rd man then picked up her valuables and handbag which were strewn on the ground. She was then pushed against the security grill by the other men and then wrestled to the floor by the man in a black jacket. It was at this moment that she realized that the man in a black jacket was in possession of a pistol which was now firmly pointed at her head.

The 3rd Appellant was at this point rummaging through her bag and jacket while the other men demanded Kshs. 300,000/ and a firearm they purported was somewhere in the house. She put her hands up and told them she had neither the money nor the firearm. The man in the black jacket then lifted her off the floor and she could now make out some movement outside the house. This man she identified as the 1st Appellant, the one with the big lips. She was then taken to the bathroom from which the 3rd Appellant had emerged. The room was a mess and her assailants again asked her for the money and firearm and again she reiterated that she had neither. They then took her to her bedroom and once again repeated their demand and again she told them she had neither the money nor the firearm. They left her bedroom with the man in the yellow cap leading her into the bedroom on the other side while the 3rd and 1st Appellants remained in her bedroom.

She was thereafter led downstairs where they found the 1st and 3rd Appellants sitting on the lounge sipping soda and eating chips. The man in the yellow cap joined them while the man in the black jacket led her to the kitchen. When they entered the kitchen he threw her onto the floor and proceeded to put his pistol into her mouth before once again demanding the money and the firearm. Since she could not speak due to the gun in her mouth she just shook her head and when he removed the gun from her mouth she said she had neither the money nor the firearm. During the entire ordeal her assailants were talking amongst themselves in Kiswahili and then addressing her in English.

She was then led back to the lounge where she sat to the left of the 3rd Appellant which was to the right of the 1st Appellant and the man in the yellow cap came and sat next to her. He then proceeded to start touching the inside of her thigh and vagina. She was at this point dressed in denim jeans and a t-shirt. The 1st Appellant seemed amused by this turn of events and started laughing as was the man in the black jacket. The man in the yellow cap then grabbed her hand and led her upstairs into the American's bedroom. He was armed with a pistol and asked her to take her pants off. She pleaded with him but he cocked his gun and asked her to take the "fucking pants off". She again pleaded with him but he started walking towards her and she relented and took her pants and underpants off. He then asked her to get on the bed and as she walked past him to get to the bed he inquired as to her HIV status to which she replied

she was negative and he answered that that was good. She climbed onto the bed and the man took off his clothes and started raping her. He did not use a condom. While he was in the act the man in the black jacket walked into the room and shut the door behind him.

When the man in the yellow cap was done the man in the black jacket tried to do the same but she pushed him off and pleaded with him to use a condom. A discussion ensued as to where he could get one and after rummaging around the room he found some. He then stripped and proceeded to rape her. As he raped her the 1st Appellant walked into the room and started talking and laughing with the man raping her. He then climbed onto the bed and tried to put his penis in her mouth. She repulsed his first attempt and this appeared funny to the 1st Appellant and he persisted. The rapist then ejaculated and threw the condom to the side of the bed. The 1st Appellant, the one with the big lips, then tried to rape her but she refused and pleaded with him to put a condom on. He picked one up but he appeared oblivious of the procedure of putting one on and consequently put it on the wrong way before proceeding to rape her. While he was in the act the 3rd Appellant walked into the room and said something in Kiswahili to the 1st Appellant and they laughed. He then picked one of the condoms and left.

Then the 2nd Appellant, the one with the wide set eyes, walked into the room with a big grin on his face and started talking to the 1st Appellant who was still raping her and they started laughing. The 2nd Appellant then walked to a position behind her head where she could not see him and this caused her to fear that he was planning on slitting her throat. The two assailants kept on laughing. When the 1st Appellant was done the 2nd Appellant also put on a condom and proceeded to rape her. After he was done she sat up and asked whether she could put her clothes back on which he allowed before leaving her in the room alone.

After a while she peered down the hallway and realized there was no one around but as she was trying to walk towards the door the 1st Appellant appeared and led her towards Mrs. Leakey's house. They entered the house via the back door that led them into the kitchen. She noticed a man in a balaclava standing next to the 2nd Appellant and the first man to rape her. She noticed food was cooking and all the burners on the stoves were in use. She was then led into the dining area where she noticed three African men whose hands and legs were bound and who were lying flat with their faces to the floor. To their right, Valerie Leakey was sat on the floor but her hands were not bound. She looked frightened. The 1st Appellant then put her with the rest. She could see the 3rd Appellant in the background carrying what appeared to be electrical goods/items. She stood there for about 10-15 minutes when the 3rd Appellant brought in MC, PW4, who was her house girl and threw her onto the floor. MC looked distraught and was sobbing hysterically and they even had to lay her flat as she kept swallowing her tongue.

The men in the room were; the 1st Appellant who was standing near the door with the man in the yellow cap, 2nd Appellant standing in the kitchen with the man in the balaclava and the 3rd Appellant was standing at the entrance to the kitchen. She saw a total of 6 strange men in an area that was well lit by natural sunlight and she could clearly see the 5 men whose faces were not covered. The man in the yellow hat then asked her to join him at the dining table but she was adamant she would not go to the dining table if Mrs. Leakey, who was old and frail, was not allowed to sit down as well. He acquiesced and they were allowed to sit at the table. The 3rd Appellant then brought them a bottle of scotch and some glasses. The man in the yellow cap poured some for her but she informed him she did not drink alcohol. The witness and the man in the yellow cap had a conversation for about 2 to 2^{1/2} hours focused mainly on their respective families. The 1st, 2nd and 3rd Appellants served them food at some point.

After their conversation the man in the yellow cap shouted orders and the 1st, 2nd & 3rd Appellants got up and grabbed all the other captives and led them down the hallway. They left her at the table with the man in the yellow cap. He shouted more orders and the 1st Appellant came into the room wielding a panga, got hold of her before leading her down the hallway to a room where she found the rest of the captives. The man in the black jacket then gave orders and the 1st and 2nd Appellants who were wielding pangas cut up the curtains and used pieces of the same to tie them up. The assailants then got into a heated argument in

Kiswahili which she did not understand but she noticed that MC started crying and the rest of the captives appeared dejected. She asked Mrs. Leakey what was going on and she told her that the assailants had said they would leave and then come back to kill them.

The house then went quiet and they heard car doors opening and banging shut before a car drove off. She tried to open the door but the 3rd Appellant stepped into view and pointed a gun at her head and asked her to sit down. They then spent 1-1½ hours with the 3rd Appellant checking in on them periodically. They then heard what sounded like two vehicles arrive at the compound. The door to the room was opened and six people were pushed into the room. The 1st, 2nd and 3rd Appellants tied the new additions as well and then left the room. The witness then asked Susan Perrot, one of the additions, what had happened and she informed her that the men had shown up at their house, robbed them and bungled them into the car before bringing taking them there. 1st, 2nd & 3rd Appellants then came back this time 1st Appellant was wielding a guitar, 2nd Appellant a panga and the 3rd Appellant a pistol. The 1st Appellant started singing ghetto songs about killing them and this lasted for about half to three quarters of an hour before the assailants left the room and again shut the door behind them.

Shortly thereafter, another man was led into the room who informed them he was from Dr. Western's property which was next door. He told them not to worry since the shamba boy had evaded capture. He told them that the man in the yellow cap and the one in the black jacket had shown up to the property appearing drunk and had attempted to catch him and the shamba boy who had escaped and who he was sure would alert others. The 3rd Appellant, armed with a pistol, entered the room followed by the man in the yellow cap who was yelling. They were joined by the 1st appellant as they tried to shut the door. The assailants then left and after a while they heard the doors of a vehicles being locked and subsequently driving off. This was around 5.30 pm. A panga had been left by the 1st Appellant when the assailants were trying to shut the door which they now used to cut themselves loose. They smashed the window on the door which allowed them to escape the room before running out into the parking lot where they heard the sound of an approaching car and promptly ran towards Dr. Western's place. She decided to run across the gorge to try and get to Steiners school where she could get a vehicle to take MC to the hospital. It took her about 2-2½hrs to get there and when she got there she found her friends who lived there. She explained what had happened and one of her friends, Judith Brown, took them to Nairobi Women's Hospital.

They got to the hospital at around 8-8.30 pm due to traffic. They were seen by a doctor and they explained what had transpired. They were given post exposure drugs and morning after pills. They were then driven back to Steiners School where she and M spent the night at Judith's house. She was issued with a small card at the hospital and was asked to return after 4 days for the medical report. When she picked it up she had already seen the police who had given her a P3 form and referred her to see a Dr. Kamau. The report she got was lost as it was stolen when the original court file was stolen from the magistrate's chamber while he was on vacation which meant she had to get a copy from the hospital which she identified in court.

PW1 returned to her house the next day and found police officers all over. She identified the following items as having been stolen during the incident; Nokia mobile phone, Sony radio, Toshiba laptop in a black bag, two watches and a car jack. The items were all valued at over 1 million shillings. The incident had been reported at Ongata Rongai Police Station and she personally made a report at the station 2 or 3 days later. She met Inspector Kinyua and Inspector Njoroge and she chose to write her statement. Her duly filled P3 form by Dr. Kamau was lost with the previous court file.

She testified that she was later called to Ongata Rongai police station and an identification parade assembled. It comprised of about 8 to 9 men of similar height and when she was asked if she could recognize any of them she said that she could not recognize anyone. Back in the CID room she was told by the Inspector that a man who had confessed to being part of the robbery wanted to see her and apologize. The 4th accused was brought and he apologized for what he and others had done.

On 17th May 2006 she was called by Inspector Kinyua who asked her to go to Kilimani Police Station where two men involved in the robbery were being held. When she got there she was informed that an identification parade would take place. She was led into a well lit room where she identified a man standing in the middle of a lineup of 8-9 men of similar height as the 1st Appellant by touching him on the shoulder. She was then led back to the CID room where she waited as they set up the next parade. She was called after half an hour and was again asked to identify a suspect whereupon she identified the 3rd Appellant who was standing to the left hand side of the parade by touching him on his shoulder.

The following day she went to Muthangari Police Station to identify another witness. She was once again led to another room containing 8-9 suspects and was informed that if she recognized any of them she should walk up to the person and touch him. She noticed the 2nd Appellant on the far right side of the parade and identified him by touching him on the shoulder.

She was later informed that her laptop had been recovered and she went to Inspector Kinyua's office at Ongata Rongai Police Station where she identified it.

PW2, FRANCIS WAWERU NDUNGU testified that he was a businessman from Chuka in Meru and in 2006 he was living and working around the Maasai Lodge area as a driver for one John Adam. On 31st March, 2006 at around 1.30pm just after lunch he was with a colleague in one of the staff quarters when they heard a motor vehicle enter the compound. They went out and saw it was Mrs. Leakey's car. Two men got out of the car and started talking to John Adam, his employer, in Kiswahili which he did not understand. His employer thus called him to interpret what was being said by the two men. He asked them what they wanted and they told him that the owner of the vehicle had problems. He got closer to find out what problems had befallen Mrs. Leakey at which point the man pulled out a pistol. He was about 2 meters away from him and it was easy for him to identify him. The man behind him also produced a pistol and asked him to tell his employer to co-operate.

They were asked if there were other people in the house and John told them that Susan Perrot, Peter Perrot and his wife Liz were in the house. The assailants then took them into the house and they were all kept in the common room with their hands tied. John was asked by the robbers to give them money and guns but he said he had neither. After about 15 minutes one left in Mrs. Leakey's vehicle before returning 15-20 minutes later with his accomplice. There were now 5 robbers who proceeded to harass them up to around 4-4.30 pm.

The robbers took phones, laptops, cameras and money from the "wazungus". He could see that their assailants were taking alcohol. They then bundled them into two cars, Mrs Leakey's and Adams', before they all headed off to Mrs. Leakey's house. When they got there they were led into a room where they found Mrs. Leakey, CCS, MC, Joseph, Giriama and others all tied up. He also noticed another armed man when they got to Mrs. Leakey's. For a while they were guarded by just one man and the house was quiet before the others returned noisily and brought with them Mr. Western's driver who they locked up as well.

The assailants stayed for a while before locking them in at which point they heard a car leaving. They stayed in the room for 30 to 45 minutes before letting themselves out. They went to Mr. Western's since there was an alarm and that was where they could raise an alarm. They went there and on raising the alarm Security guards and plain clothes police officers arrived at the scene. They explained what had happened and were told to all return to their respective houses.

They were later called to Ongata Rongai Police Station and informed that people suspected of committing the robbery had been arrested and that they were needed for an investigation parade. On the day in question he entered a room with men of similar height, skin colour and appearance and was able to identify one of them. He was able to identify various people on various days and in total identified 4 people who were the 1st, 2nd and 3rd Appellants. He also identified either the 4th or the 5th accused. He was sure of the first three since he had seen 1st and 2nd Appellants from the moment they had entered his employer's compound and they had spent some hours together. He said he identified 3rd Appellant since

his height had made him stand out, being so short, and also he had spent quite some time with in the house.

PW3, JOSEPH MWIRIGI THUEMKA was working as a cook at Valerie Leakey's home in the Maasai Lodge area. On 31st March, 2006 at around 9.15am three men got into the house in the company of his employer and asked him to get into the kitchen after which they inquired whether he had a gun to which he replied no. They proceeded to tie him up before three people entered the kitchen from the other door. He identified the three people as they had uncovered faces. He identified them in the dock as the 1st, 2nd and 3rd Appellants.

After about 10 minutes an assailant who was not part of the men in the dock untied him and led him to the workshop to fetch the watchman. They got the watchman whom they found painting chairs. They then returned to the house where the others were tied up in the kitchen. He was tied up with his colleagues. They were, according to his recollection, the watchman (Kisenge), the driver (Rotich) and the house girl (Monica).

Later the assailants brought C who had rented a house from his employer, Mrs. Leakey. The assailants then proceeded to cook food after which they went to their neighbour's house from whence they returned with four 'wazungus'(white people) and two of their employees. He could not recall the white men's names but one of the employees, he recalled, was called Waweru and they too were tied up. Some of the assailants later left and came back with a man named Tobiko who was employed as a driver for one of their neighbours and he too was tied up with the rest of them.

The assailants were at this point taking alcohol and after a while they locked them in the room and left. Around 20 minutes later they realised that the thieves were gone and they began untying themselves.

He recalled that the assailants had earlier untied and taken M away to show them where the 'mzungu'(Mrs. Leakey) hid her money. When they brought her back she was crying and when they enquired as to what had transpired she informed them she had been raped. After releasing themselves they went to Mr. Western's house where they contacted the police and informed them what had occurred.

He later went to Ongata Rongai Police Station and was informed that the robbers had been arrested. An identification parade was carried out where he was able to identify the 1st, 2nd and 3rd Appellants.

PW 4, M. C was working for Mrs. Leakey as a house servant. On 31st March, 2006 she had just finished sweeping the verandah when she had the sound of a car approaching the house. She assumed it was Mrs. Leakey's vehicle leaving the compound. She then saw three people open the verandah door. She testified that the 1st Appellant was armed with a pistol and that one of the assailants who was not in court was armed with a knife. The men got hold of her and asked who she was with in the house and she said she was with the cook. They proceeded into the kitchen where they found Mrs. Leakey, the cook and the driver tied up. The cook was named Joseph while the driver was called Giriama. They had cut up an apron and used it to tie both their arms and legs. She identified the 1st Appellant as the person who had cut up her apron and tied up her legs.

The assailants then proceeded to ask them for money but they had none and they took their phones. She was then asked by one of the men to show them where she worked. She took him into the sitting room where he asked her to kneel down before proceeding to remove his trouser and asking her to put his penis into her mouth. He warned her that if she bit it he would slap her. After he was done forcibly obtaining oral sex he took her back to the others.

Another assailant then got hold of her and asked her to go help him slaughter a chicken. He took her to a guest room where he asked her to undress. She identified him as the 1st Appellant. He then proceeded to rape her before returning her to the rest of the hostages. The 3rd Appellant then took her back to the guest room and upon putting on a condom proceeded to rape her. He then took her back to the rest of the captives.

At around this time CCS texted Valerie Leakey and asked that MC be sent to clean the cottage. The assailants who saw the text asked who MC was and she answered it was her. The 2nd Appellant then enquired to the location of CCS's cottage keys and Mrs. Leakey informed him that MC did not know where the keys were. The 1st, 2nd and 3rd Appellants in the company of another not before the court went to CCS's cottage and at around 11.00 am they came back in the company of CCS who was thrown in with the rest of them.

The assailants then cooked ugali and cabbage which they fed the hostages and after the meal they were taken to another room where they were all locked up and the 3rd Appellant given sentry duties as the others left. When the other assailants came back they came back with four 'wazungus'(white people) who she did not know and 2 Africans who she identified as Waweru and Elizabeth. They were left together in the room. When the assailants next returned they had one of Mr. Western's employees who informed them that one of his colleagues had escaped capture by the men and was most likely looking for help.

At about 5.00 pm all the assailants left them including the sentry. A knife had been left in the room by one of the thieves and they used it to free themselves. Thereafter she left for Nairobi Women's Hospital in the company of CCS where they received medical attention. They also went to Rongai Police station where the matter was reported.

They were later called and told some people had been arrested in relation to the events of that day and they were asked to identify them as part of the robbing gang. She was able to identify the 1st Appellant as the 3rd person in the first parade. She was able to identify the 2nd Appellant as they had sat opposite each other at the dining table. She had never met any of the assailants before and she neither identified nor knew the 4th and 5th accused.

The identification parade she took part was conducted on 22nd May 2006 and the first parade consisted of 10 people who were similar while the second parade had 9 people who were of different appearance but almost of the same size and height. Other witnesses were Joseph and Elizabeth. She could not remember the date she went to the hospital.

PW5, INSPECTOR WILSON YEGON was then attached to CID Ngong. On 29th May, 2006 he was requested by Inspector Kinyua of CID Ongata Rongai to conduct an identification parade. The witnesses were 3, namely; Joel Kipngeno Rotich, Tobiko Nkawairiel and Francis Waweru Ndungu. All the Appellants consented to the parades. The 1st Appellant was identified by all the witnesses. With respect to the 2nd Appellant, the 2nd witness, Tobiko Nkawairiel did not identify him. The parades forms in his respect(exhibits 7 a,b, and c were lost from the court file. Further, all the witnesses positively identified the 3rd Appellant. Suffice it to say, all the Appellants waived their right to have counsel or other witness in the parades. They were satisfied by the manner the parades were conducted and they signed their respective forms in that regard.

PW6, MBAI KISENGE KAMULA recalled he was employed by Valerie Leakey in Maasai Lodge area as a night watchman and during the day he worked in the workshop. On 31st March, 2006 at around 9.00 am he was assigned the duty of painting seats by his employer and he proceeded to carry out the set out the same. When he was in the process he heard the dogs barking and assumed that it was caused by the wild animals in the vicinity. After a few minutes he heard the dogs barking again and a few minutes later he saw Joseph, the cook walking towards him in the company of a visitor dressed in a Maasai shuka(shawl). They greeted him and the guest asked him whether he knew him to which he answered he did not and that was when he noticed that the man had a pistol and he was informed by the stranger that the pistol was not a toy. He demonstrated by removing and returning one bullet from the firearm. He enquired as to whether there was anyone else in the home and he said no. He testified that the person who accosted him was not in court.

He was then taken to the house where he found two people at the entrance wielding pangas. He identified, on the dock, one of them as the 1st Appellant. He found in the house; Valerie, Ngiriyama, Joseph and M

who were all tied up. The robbers asked Valerie for money and took away her rings by force. He did not see the person who took the rings off Valerie's hand.

M was taken away by one of the robbers allegedly to show them where the money was and she came back crying and when he enquired what had happened she said she had been raped. The robbers then cooked food and offered some to the captives and he recollected that the 1st and 2nd accused were the ones who fed them. He recalled that they had also offered them soda when they were thirsty and escorted him to the toilet when he needed it.

The assailants later said they were going to the neighbours to look for money before leaving and returning with 2 Africans and 3 'wazungus' whom they brought into the room and tied up. They left again and this time came back with David Western and his driver before finally departing.

On 5th April, 2006 he went to Rongai Police Station where he recorded a statement and also attended an identification parade although he was unable to identify any of the persons in the parade. He testified that he did not recall seeing the 3rd, 4th and 5th accused at the scene.

PW7, Ag INSPECTOR GEOFFREY KINYUA was from February 2006 to July 2006 stationed at CID Ngong-Ongata Rongai. On 1st April, 2006 at about 9.00 am the DCIO had called him and informed him of a robbery that occurred the previous day in the vicinity of Maasai Lodge and asked him to accompany him to the scene. The matter had been recorded on 31st March, 2006 and an occurrence book report made. The DCIO wanted the CID to take over investigation of the matter.

They proceeded to a house bordering the Nairobi National Park belonging to one Val Leakey. She gave them the particulars of what had taken place the previous day and he was also taken to the location of the alleged sexual assaults and at the first scene he noticed that the bed had stains indicative of rape. There also were two pieces of clothing that the rapists had used to wipe themselves off after the assaults and Mrs. Leakey also informed him of a used condom that had been given to the OCS Ongata Rongai.

When he interrogated Mrs. Leakey and the rest of the witnesses they appeared traumatized and could not record statements at that moment. He therefore asked them to go to the station the next day to do so. He took the bed cover as well as the two pieces of clothing next to the bed. He also obtained the used condom from the OCS Ongata Rongai. He filled an exhibit memo form and sent the said exhibits to the Government Chemists for analysis.

CCS and Mrs. Leakey chose to self-record their statements in which they detailed, explained and described the perpetrators of the various crimes. On 22nd April, 2006 at around 8.00 pm one of his informants informed him that one of the suspects had been spotted on the Kiserian/Langata Road just after Ongata Rongai town. They left the station in pursuit and managed to arrest him. He was the fourth (4th) accuse.

On 5th May, 2006 while in the course of investigations they learnt that one of the suspects had been seen in Nairobi City Centre at a discotheque. He took PC Ngumbi, PC Musembi, PC Otieno and the informant and left for Ronald Ngala Street where the discotheque was located. However, on their way there they were informed that the suspect had boarded a matatu headed to Ngong. This was at around midnight. The matatu was travelling along Haile Selassie Avenue headed towards Ngong and they caught up with the matatu at the Traffic Headquarters where they stopped it and conducted a search. They searched every passenger and finally found Harrison Kariuki alias John Mwangi Kariuki, the 1st Appellant. They interrogated him he informed them that he had left another suspect at the discotheque along Ronald Ngala Street.

Since the other suspect was also known to the informer they dropped the 1st Appellant off at Parliament Police Station before proceeding to the discotheque where the informer identified him and they arrested him. They then went back to Parliament Police Station to pick Harrison Kariuki before proceeding with the two suspects in their custody to Ngong Police Station.

On 10th May, 2006 the DCIO Kilimani called him and told him that he wanted to interrogate Kariuki, 1st Appellant, and Otieno, 2nd Appellant in relation to certain crimes committed in his jurisdiction. The DCIO then sent an officer to pick them and forward them to Kilimani Police Station.

With regards to 3rd Appellant he had been arrested by CPL Mwangi of Kilimani Police Station and he informed the court that the arresting officer would come and explain the circumstances surrounding that arrest. The informant had also helped in the arrest of the 5th accused.

After the arrests, the witnesses were called to undertake the task of identifying the suspects in identification parades. Witnesses were called and they identified the 1st, 2nd and 3rd Appellants. A report from the Government Chemist on the analysis of the exhibits forwarded was also produced but was lost when the original file was lost. He also produced the stolen laptop that had been recovered by officers from Kilimani Police Station and produced it as exhibit Exhibit 3.

PW7 also testified that the ringleader of the gang behind the offence was arrested in 2008 in Eldoret and charged accordingly but separately as the instant case had almost been concluded. Another suspect who went by the nickname 'ma boy' had been located at Race Course in the Kilimani area and shot when he did not heed police instructions to stop. He had been later identified at City Mortuary by both Valerie Leakey and CCS.

He also testified that all the exhibits had been produced in the previous file that was lost. However, since the police file was still intact, and given that he had produced the same exhibits in another case where one Castro Odhiambo was charged, he sought to produce them in this case. They were a stained bed cover, green shawl and black shawl as MF6, MFI 9 and MFI 10 respectively.

The prosecution then closed their case and the learned magistrate made a ruling that a prima facie case had been established and put the Appellants on their defence. The 4th and 5th accused persons were acquitted under Section of the Criminal Procedure Code. All the Appellants gave sworn statements of defence.

DW 1, HARRISON KARIUKI MWANGI the 1st Appellant recalled that on 31st March, 2006 he was at home and he played football until 6.30 pm and at around 7.00 pm he told his friend in Kayole that he had to go home since he lived with his mother who was old. He got home at around 9.00 pm. He also recalled that he was on his way home when the matatu he was in was stopped and everybody ordered to raise their hands as the vehicle was also searched. The search did not uncover anything in the car and they took him and another passenger to Ongata Rongai Police Station. He recalled that of the 14 passengers in the matatu 6 young men had been placed aside and had all been taken to the police station. One of the officers told them that there was an ongoing investigation and two days later on 17th May 2006 the officer who arrested them came to the cells with a camera at around 11.00 am and took photographs.

He sought the reason for taking of the photographs and was told to stay calm as the police knew their jobs. After the photograph he stayed in the cells at the police station for 40 days without being charged. When he was taken to court where he denied all the charges.

He produced as defence exhibit 1 the OB number 63/31/3/2006 that showed that in the original report it said that the complainants were robbed by unknown people and he was categorical he was not one of them. He also produced a DNA analysis report which he stated did not connect him to the offence of rape. He further testified that after the loss of the first file and before they took plea to the charges in this file he was kept in remand for more than a year. He concluded by testifying that the initial report had only two complainants and that he had been framed by the investigating officer.

DW 2, NANCY NJERI MWANGI was the mother of the 1st Appellant. She recalled that on 31st March, 2006 the 1st accused was at home and they took supper together. When they woke up the next day they had breakfast before she went to the farm. She stayed with him the whole day and he did not leave her at any moment. She testified she did not know whether he had raped a lady.

DW3, KENNEDY OTIENO JUMA the 2nd Appellant stated that his rights under Article 25 of the Constitution of Kenya, 2010 had been violated. He recalled that he was arrested in a nightclub on 14th March, 2006 and taken to Ngong Police Station at 9.00 p.m. He stayed there until he was taken to CID Kilimani before being taken to Ngong Forest where he was tortured to admit the charge and evidence. He testified that he was kept in custody for 40 days before being arraigned in court in criminal case 3438 which infringed on his right to a fair trial.

He further testified that on 31st March 2006 he could not have committed the offence as he had gone to Nyakadi for a funeral which was an area far from Nairobi. He further relied on the first report to the police station which was made by telephone that the victims had been attacked by two people.

He testified that if CCS had taken part in an identification parade then the forms evidencing the same should have been produced and that the assertion that they were lost with the other file was a lie. He concluded by stating that CCS did not describe him in the first report.

DW 4, MARY ANYANGO OKUL was the mother to DW3. She recalled that on 24th March, 2006 she received a phone call from home that her father-in-law was dead and she traveled there with her children. The burial was set for 1st April, 2006 and therefore on 31st March, 2006 DW3 and others were preparing the field and erecting a tent. He also dug a grave with his friends. She was categorical that on 31st March, 2006 he did not leave the homestead.

On cross examination she stated that they had traveled in DW3 father's car whose number plate she could not recall.

DW 5, JOSHUA OMOSA NYANGAU, the 3rd Appellant recalled that in the year 2006 he was living in Kikuyu and on 31st March he was sure he was helping out his grandmother who had come for treatment at Kenyatta National Hospital. He testified he was arrested in Kikuyu by officers from Kilimani Police Station among others who were almost 15 in number. He stayed in Kilimani for three days whereupon he was called and informed he was needed for an investigation.

He testified that the medical report that was produced in court stated that CCS's genitalia were normal. Therefore, she could not have been a victim of rape. Further that even though his name appeared in the DNA analysis he did not commit the rape. He also testified that he was in class six and aged 17 when the offence occurred and finally that the original report did not mention or describe him.

DETERMINATION.

I have now considered the evidence on record alongside the respective submissions. My summary of the issues for determination are as follows;

- 1. Was the identification of the Appellants proper as to support a conviction?**
- 2. Were the Appellants granted a fair trial?**
- 3. Were the charges proved beyond a reasonable doubt?**

I will first determine the issue of whether the Appellants received a fair trial. It was submitted that Articles 25 and 50 of the Constitution of Kenya, 2010 and Section 200 of the Criminal Procedure Code were violated. With regard to contravention of Section 200 of the Criminal Procedure Code, it was submitted that the trial was heard by various magistrates. At the succession of one magistrate from the other, the succeeding magistrates failed to accord the Appellants their right to have the trial heard de novo. The contention is that under the provision, an accused's wish must carry the day and the trial court has no discretion to vary that wish.

The entire Section 200 deals with conviction on evidence partly recoded by one magistrate and partly by

another. But in light of the Appellants' submission, the relevant part of the provision is subsection (3) thereof which reads as follows;

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

It is important then to refer to the record of proceedings before arriving at a conclusion of whether or not the law was contravened. This is a case with its own history. I say so because rarely are trials heard de novo as many as seven times represented herein. It has gone through a convoluted path, the result of which was the long delay in its conclusion. It has involved the disappearance of a file, the withdrawal of a case under Section 87(A) of the Criminal Procedure, recusal of a magistrate and transfer of magistrates.

The matter first came up before Hon. Githua C.M (as she then was) who never heard or recorded the evidence of any witnesses. It was then transferred to Hon. Nzioka S.P.M (as she then was) where the Appellants took a plea and she heard and recorded the evidence of CCS(PW1), MC(PW4) and allowed for the amendment of the charge sheet under Section 214 of the Criminal Procedure Code. The matter was thereafter placed before Hon. Nyakundi, P.M who allowed the case to begin de novo. She heard the evidence of CCS(PW1). It then moved before Hon. A. Mwangi, PM who stated the matter would be heard before Hon. Nyakundi and set dates for the same. However, the file returned to her and she informed them that Hon. Nyakundi would not be coming back to the station and the matter had to be heard by her. She allowed the recalling of witnesses. She subsequently recused herself from the matter and it was transferred to Hon T. Matheka, S.P.M who heard the evidence of Francis Waweru Ndungu, Joseph Mwirigi Thuemka, MC, No. 231987 Inspector Wilson Yegon, CCS(after she was recalled), Mbai Kisenge Kamula and No. 46409 Ag Inspector Geoffrey Kinyua. The prosecution's case was closed before her. Her ruling under Section 211 of the Criminal Procedure Code putting the Appellants on their defence was read on her behalf by Hon. C.N. Ondieki, RM. The matter thereafter moved before Hon. L. Onyina Ag. SPM, who read to the Appellants their right under Section 200(3) of the Criminal Procedure Code. They agreed that the matter proceeds from where it had reached. Defence hearing was to commence forthwith. Their advocate later applied for the case to start de novo but the learned magistrate made a ruling for the matter to proceed and he asked the Appellants to make an election under Section 211 of the Criminal Procedure Code on how they wished to proceed with the defence. He then heard the defence, wrote and read the judgment as well as sentenced the Appellants.

It is important to note at this point that at all the instances that succeeding magistrates took over the conduct of the trial, they explained to the Appellants their right under Section 200(3) of the C.P.C. The question that flows is whether an accused has an automatic right to choose that the trial begins de novo every time a succeeding magistrate takes over the conduct of the trial.

The provision is in very clear words that the mandatory obligation is on the trial court **“to inform the accused of that right”**. On being so informed, **“the accused may demand that any witness be resumed or reheard...”**, which means that there is no automatic right to the accused to choose that the matter must be heard afresh. In effect the trial court must carefully evaluate the circumstances of each case in determining whether there is need to have the trial heard de novo. Such factors that may inform the court on the decision to make include but are not limited to, availability of witnesses, the age of the trial, incapacitation of the witnesses and prejudice likely to be suffered by the accused. In so determining, the interests of justice must take priority.

In the present case, Hon. Onyina in declining the Appellants' demand that the trial be heard de novo made a ruling dated 6th March, 2013 in which he outlined the reasons he thought that the Appellants' demand was unwarranted. Majorly, it was that the matter was too old and a further delay was not serving any justice. I must note that as at this point, the Appellants had been ably represented by counsel. They had cross examined the witnesses to the extent they wished. No new evidence or material was likely to be brought out by rehearing the trial other than serve injustice by delaying the trial. Besides, when Hon Matheka took over the conduct of the trial she allowed the Appellants to recall PW1 who was ably cross

examined. The demand therefore was convoluted to maintain the status quo. In that case, I hold that no constitutional right to a fair trial of the Appellants was violated.

It was further submitted that the Appellants were not accorded a speedy trial pursuant to Article 50(2)(e) of the Constitution which provides that;

“Every person has the right to a fair trial, which includes the right-

(e) To have the trial begin and conclude without unreasonable delay”

Under this head, the Appellants submitted that after the matter was pulled out under Section 87(a) of the Criminal Procedure Code they were kept in jail for a year before being charged afresh. This court has perused the record before it and it is clear that the Appellants were already sentenced in another matter. This was particularly proven when the 3rd Appellant mischievously applied for and was granted bail terms before the prosecution counsel made an application for the same to be cancelled. They were not held in prison awaiting fresh arraignment in court as alluded but were serving sentence in the another matter. Therefore, this ground of appeal fails.

The other issue that was raised by the Appellants' advocates was that the fact that the proceedings were tape recorded was explicit that a conviction would result. Permission to record the proceedings was granted by the Chief Justice and the magistrates were aware of the same and therefore allowed it. Learned counsel for the Appellants backed the protestation for the tape recording of proceedings under Article 25 of the Constitution. The Article provides for fundamental rights and freedoms that may not be limited, amongst them the right to a fair trial. Learned counsel unfortunately did not annunciate any of the right to a fair trial that was curtailed by the tape recording of the proceedings. Worthwhile of noting is that the tape recording was done by PW1 for purposes of securing the evidence in court which was her right to do so. There was also no law that prohibited the tape recording of the proceedings. This ground of appeal has no merit and I dismiss it.

The next issue to address as it was raised by the Appellants involves the fact that crucial witnesses were never called. This particularly refers to the fact that the officer who arrested the 3rd Appellant was never called to show how the arrest was effected. There was evidence on the record that a CPL Mwangi from Kilimani Police Station was supposed to be called to court as one of the last witnesses. However, the case was closed after PW7 testified. This court is guided by **MUIRURI & 2 OTHERS VS REP [2002] 1 KLR** at page 280 where it is stated:

“The failure to call the officer who arrested the ... accused was a serious omission. Such an omission in an appropriate case might lead to the quashing of an otherwise sound conviction.

We have however considered the facts and circumstances of this case and we do not consider that the omission to call the person who arrested the ... accused, per se, is fatal to the appellants' respective convictions. They were before the court, were present when witnesses testified and were given an opportunity to cross examine witnesses and to testify on their own behalf.”

It is important to note the circumstances of the case in question pertain to matters that occurred in 2006 and had been in court intermittently since that year. The sheer number of complainants who did not testify in this case was mind boggling. They either died in the case of Valerie Leakey and the rest supposedly left the country. The trial court dropped 8 counts primarily because the complainants did not adduce evidence on them. Looking at that and taking special consideration of how long this matter had been bogged down during the trial this court is satisfied that the Muiruri exception applies in this matter and therefore finds the failure to call CPL Mwangi not fatal to the case. The case law is explicit that if other evidence on record is sufficient to sustain a conviction, nothing stops the trial court from so finding. This is the consideration that this court will have regard to in arriving at the final decision.

The Appellants also contend that their right to a fair trial was contravened when they were not allowed to

mount a proper defence by the prosecution's failure to grant them the initial report of the crime. The issue of the occurrence book entry was dealt with by the prosecution counsel during the trial when he stated that the Occurrence Book had actually disappeared from the Ongata Rongai Police Station. The need for an initial report by the Appellants was to find out whether there was an adequate description of the Appellants at a pre-trial stage. The investigating officer stated in his evidence that when he went to the house on 1st April, 2006 he looked at the witnesses and deemed them to be traumatized and as such asked them to come to the police station the next day. PW1, CCS, stated that she did go to the station and personally wrote a statement which the Appellants were supplied with and which they relied upon in the cross examination of the witness. Would such an initial statement by the witness be deemed to be an initial report?

In this particular matter it would seem that the first to report the matter to the police was either Valerie Leakey or one of the people who headed to Dr. Western's house. Given the lack of an OB entry it appears that the descriptions of the Appellants could therefore only be obtained from the statements that each of the witnesses made with the police. The only time the issue of an initial statement arises is with regard to C which the Appellants asked for and were provided with to enable them set out a defence. Unfortunately, the finding in the report as recorded by the court cannot be authenticated herein as court file in the original trial was stolen.

This compounded by the fact that the Appellants were requesting for Occurrence Book entry in 2013 about 7 years after the matter had begun leaves questions begging if they knew of the court file disappearance. Be that as it may, the matter turns on whether any prejudice was occasioned by not providing the first report at that juncture. It is clear that the fact that the Appellants had the initial statements of the witnesses mitigated any prejudice that would have been occasioned. As such, I conclude that that ground of submission fails.

I shall now delve into the identification of the Appellants. The Appellants contend that their identification was not proper and at best constituted dock identification which according to the Appellant is unreliable see; **NJOROGE VS REP[1982-88] 1 KAR 1134**. They further asserted that the identification parades of the Appellants were botched and could not be relied upon. They relied on **MBURU & ANOR VS REP[2008] KLR 283** and **ALLEN VS DIRECTOR OF PUBLIC PROSECUTION[2014] EALR**. This court must under its duty as a first appellate court therefore, analyze and evaluate the identification of the Appellants. I will do so having in mind that the identification of the Appellants in the parades was challenged as unprocedural and against the law. The only witness in the parades on whose evidence they were convicted was PW2. I will therefore give a chronology of the parades in which he was the witness.

The Appellants, according to PW5, did take part in identification parades of their own volition as evidenced by the production of MFI 6(a), MFI 6(b) and MFI 6(c) at the trial. The Appellants did according to the officer conducting the parade each agree to the constituent members of the respective parades. They inserted their names into the space on the form designated and also waived their rights to have a friend or a solicitor present during the identification parades. The witnesses who took part in the parades were; John Kipngeno Rotich, Tobiko Nkawarel and Francis Waweru Ndungu, PW2 in that order.

The 1st Appellant was asked to choose a position before the 1st witness and chose between member number 6 and number 7. The witness was then summoned and he positively identified the Appellant. After the witness was dismissed he was asked to choose a new position and he chose between members number 4 and number 5. The 2nd witness was then called but he was unable to identify the Appellant. The witness was dismissed and the Appellant was asked where he wanted to be placed he chose to remain between members number 4 and 5. The 3rd witness was called and he identified him positively. PW5 then asked him whether he was satisfied in the manner in which the parade was conducted and the Appellant agreed and he again inserted his names on the form in the designated area and signed.

The 2nd Appellant was asked to choose a position among the members and choose between the 6th and 7th members of the parade. The 1st witness was called in and he positively identified the Appellant. The witness was dismissed and the suspect was again asked to choose a position and he went for a position

between the 4th and 5th member. The 2nd witness was called in and he was unable to identify the Appellant. The witness was then dismissed and the Appellant asked to choose a new position to which he chose to be between the 3rd and 4th members of the parade. The 3rd witness was then called and he positively identified the Appellant.

The 3rd accused was asked to choose a position in the parade and he chose between the 6th and 7th members of the parade. The 1st witness was then called in and he positively identified the Appellant by touching his shoulder. The witness was dismissed and the Appellant asked to choose a position in the parade to which he chose the same location, namely between the 6th and 7th member. The 2nd witness was then called in and he positively identified the Appellant by touching his shoulder. The witness was dismissed and the Appellant was asked to choose a new location to which he decided between the 7th and 8th members of the parade. The 3rd witness was called in and he positively identified the Appellant by touching him on the shoulder. He then asked the Appellant if he was satisfied with the conduct of the parade to which he answered “ndio” in Kiswahili. He then inserted his name on the form as means of appending his signature to the same.

The learned magistrate in confirming a positive identification based his findings on the evidence of PW2's identification of the three Appellants in the identification parade. I have taken the liberty to elaborate the manner in which the identification parades in the respect of the three Appellants in which PW2 was the witness was conducted so as to erase any doubts that the same was without an iota of flaw. None of the provisions of Rule 11 under the Police Standing Orders was contravened. The same members of a parade can be used in the identification of different suspects by one witness so long as the parades are distinct for each suspect and the suspect is given an opportunity to change positions. That was the procedure used in identifying the Appellants by PW2.

Besides, although the complainant in Count II for which the Appellants were convicted testified as PW1 her identification parade forms mysteriously disappeared from the court file. Therefore, any positive identification of the appellants was based on the evidence of PW2 Francis Waweru Ndungú. He was working at Maasai Lodge as a driver employed by one John Adaru. He is one of those persons who were held in custody by the Appellants between 9.00 am and 5.00 pm. It was during day time and many activities took place during the captivity including conversations with the assailants. Under the circumstances, there is no doubt that the witness could not mistake the assailants.

The submission by learned counsel for the appellants was that the identification of the appellants by PW2 was dock identification. They relied on **MUIRURI & 2 OTHERS VS REP[2002] 1 KLR** at page 277, viz:

“It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.”

It is in the same **MUIRURI(Supra)** case where the court also stated:

‘It cannot be said that all dock identification is worthless. The court must base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identity.’

Similar sentiments were observed in **R VS TURNBULL[1972] 3ALL ER549** where the court stated:

“[The court should state] the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken provided that the warning is in clear terms, no particular words need be used.”

Again, in **Nzaro v Republic**[1991] 2 KAR 212 citing **R vs Turnbull** and others (Supra), gave guidelines that the courts should follow in relying on dock identification as follows:

“First, whenever 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 on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

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 a press 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 observation to the police? Was there any material discrepancy between the description to the accused given to the police by the witness when first seen by them and his actual appearance.”

The complainants and witnesses were in the company of the Appellants for periods ranging from 9 am to 5 pm. This was in clear daylight and that incontrovertible fact was never questioned. In the case of PW1 she was in their company from 11.00am to 5.00 pm and could clearly identify them as being her assailants and rapists. PW2 was with them from around 1.30 pm till 5 pm and had ample opportunity to identify them when he acted as a translator for them with his employer and on the journey back to Mrs. Leakey's house. PW2 was in the company of the Appellants from 9am to 5 pm and had ample time to see them both at the dining table and when he was walked out to go get the watchman. PW6 was also in the company of the Appellants from 9 am to 5pm and specifically remembers them feeding them ugali and cabbage, giving them soda when they were thirsty and also escorting him to the bathroom when need arose. The conducive identification conditions at the locus in quo acted as corroboration of the subsequent dock identification and identifications during the identification parades. I hold in the circumstances, that the learned magistrate properly evaluated the evidence of identification in convicting the appellants.

On sentence, the Appellants submitted that the death sentence imposed was unconstitutional. The court was referred to the case of **Geodfrey Ngotho Mutiso Vs R(2010) eKLR (Cr. Appeal No. 17 of 2008)**. However, the case law was declared as per incuriam by the Court of Appeal in **Joseph Njuguna Mwaura and 2 others vs Republic [2013] eKLR (Cr. Appeal No. 5 of 2008)**. Hon. Mwera, Warsame, Kiage, Gatembu and J. Mohammed, JJA, in so observing delivered themselves as follows:

“In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.

We hold that the decision in Godfrey Motiso v R to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to Section 203 as read with 204 of the Penal Code, treason contrary to Section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to Section 60 of the Penal Code, robbery with violence contrary to Section 297 (2) of the Penal Code carry the mandatory sentence of death.”

In further holding that the death sentence as provided in our Penal Statutes is not unconstitutional, the Judges had this to say:

“We do not think that the death sentence falls within these definitions. The death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated above, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning.

We also do not consider that the deprivation of life as consequence of unlawful behavior is grossly disproportionate. In Kenya, death is a penalty for what can be considered as the most serious of crimes. It is a proportionate punishment for the offences committed, which in many cases result in the loss of life and loss of dignity for the victims. For example, in the present appeal, the victims of the crime were roused from their sleep in the middle of the night, and faced with the threat of harm, and even death if they did not comply with the demands of the intruders. This was a violation of their right to dignity, and from all accounts, was a cruel act.

Among the purposes of punishment are retribution, so that equal harm is done to the offender, and securing justice for the victims of the crime. In addition, the punishment must serve as a deterrent, and in this case, the punishment fits the crime.”

In the circumstances, that ground of appeal is unmeritorious and I dismiss it.

Finally is the question of whether the elements of the offence of robbery with violence were proved. They are provided under Section 296(2) of the Penal Code 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.”

Needless to say, the assailants were armed with dangerous weapons, namely pangas, knives and pistols. They were more than one in number. They used actual violence in robbing their victims, some of whom were raped. Although the prosecution is enjoined to establish any of these elements in proving the offence, in the present case, all the elements were proved.

As I end this judgment, and having noted the circus through which the trial has gone through, many are the people who participated in attempt to have the trial fail through the disappearance of a court file, an entire OB book from a Police Station and identification parade forms. Of course, they succeeded to a large extent as most counts failed for lack of witnesses precipitated by witness fatigue by the delayed trial and death of one of the witnesses. This judgment no doubt will not serve justice to the said perpetrators. However, the role of the nature has its own way of effecting justice which I believe will one day be served.

In the end, I find that the prosecution proved count II to the required standard; beyond a reasonable doubt. The appeal lacks merit and the same is hereby dismissed. The conviction and sentence are upheld.

DATED AND DELIVERED THIS 17th DAY OF AUGUST, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Dr. Khaminwa and Mr. Ondieki for the Appellants.

2. Ms. Atina for the Respondents.