



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CRIMINAL APPEAL NUMBER 264 OF 2009**

[Consolidated with Appeal Nos. 259, 258 and 259 all of 2009]

**BETWEEN**

JOHN KARIUKI MWANGI.....1<sup>ST</sup> APPELLANT  
 JOSHUA OMUSA NYANG’AU.....2<sup>ND</sup> APPELLANT  
 KENNEDY OTIENO JUMA.....3<sup>RD</sup> APPELLANT  
 JAMIL ASMAN OCHIENG’ .....4<sup>TH</sup> APPELLANT  
 ANDE REPUBLIC OF KENYA.....RESPONDENT

[An appeal from the Judgment Mr. Maundu, Senior Resident Magistrate, in the Chief Magistrate’s Court at Kibera, Criminal Case Number 3717 of 2006 as consolidated with Criminal Case Number 5168 of 2006].

Appeal before Justices Monica Mbaru and James Rika.

1<sup>st</sup> and 4<sup>th</sup> Appellants present in person.

2<sup>nd</sup> and 3<sup>rd</sup> Appellants present represented by Mr. Evans Ondieki and Ms. Makena Kaburu Advocates.

The State appearing through Mr. O’mirera, Senior Assistant Deputy Director of Public Prosecutions

**JUDGMENT**

1. The four Appellants were charged with four counts of robbery with violence, contrary to Section 296[2] of the Penal Code. The fourth count appears to have been dropped at some point. Victor Paul, named as the complainant under the fourth count was not a witness. The Appellants were also harged with the offences of rape against U C and B S. The Judgment of the lower Court suggests the Appellants were alternatively charged with indecent assault on a female contrary to Section 144 [1] of the Penal Code. This is not however clear from the charge sheet contained in the Record of Appeal forwarded to the High Court. The four Appellants were convicted and sentenced for the offence of robbery with violence. We shall focus on the three counts of robbery with violence for which they were found guilty, and are the subject matter of their Appeal. The three counts were detailed as follows-:

**Count 1** On the 12<sup>th</sup> day of March 2006, at Masai Lodge Area, Ongata Rongai in Kajiado District within Rift Valley, jointly with others not before Court while armed with pistol, robbed M M of one motor vehicle [Reg. KAP 855W] a Land Rover, one golden ring and cash of 2,000/- all valued at Kshs. 2,017,000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said M M.

**Count 2** On the 12<sup>th</sup> day of March 2006, at Masai Lodge Area, Ongata Rongai in Kajiado District within Rift Valley Province, jointly with others not before Court, while armed with dangerous weapons namely: pistols, robbed Roberto Bronziro 2,800 dollars, 3 cameras, two watches make Casio, one mobile phone make Siemens, one DVD Player, one movie CD, clothings and cash 7,000/- all valued at Kshs. 3,280,750/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Roberto Bronziro.

**Count 3** On 12<sup>th</sup> day of March 2006, at Masai Lodge Area, Ongata Rongai in Kajiado District within Rift Valley, jointly with others not before Court, while armed with pistols, robbed K K of one hundred golden finger ring, one video camera, and one mobile phone make Nokia, all valued at Kshs. 90,000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said K K.

2. M M [PW2] testified he comes from Germany, lived at Rongai and served as a Missionary with the *[particulars withheld]* Broadcasting, in the capacity of Director. He, his wife M, B S and Victor Paul were, on 12<sup>th</sup> March 2006, invited by K K and UK for a picnic. They used M's Land Rover Discovery KAP 955 W. They reached K's residence, parked the car and walked to the picnic site. Some people who were armed with pistols accosted M and his party. The attackers demanded to be given money. M gave then Kshs. 2,000. They demanded for more. PW2 gave them his wedding ring which was golden with the name of his wife inscribed upon it. It was worth Kshs. 20,000. His wife similarly gave out her ring. PW2 testified it was the 2<sup>nd</sup> Appellant who took the ring from him. The 1<sup>st</sup> Appellant mocked the ladies, asking whether they wished to have the rings back, while at the same time pulling B blouse and leering at her breasts. The attackers had three pistols. The 2<sup>nd</sup> Appellant carried the bag in which the stolen items were kept. The 2<sup>nd</sup> Appellant carried no pistol, but took all the things which the 1<sup>st</sup> Appellant asked the victims to surrender. M described the 3<sup>rd</sup> Appellant as a bit kind; he allowed old man Victor Paul, who suffered from diabetes, to use the lavatory whenever the need arose. The 4<sup>th</sup> Appellant gave orders to another attacker who looked like his brother. The 4<sup>th</sup> Appellant was armed, and stood behind M and the other picnic goers. The robbers took PW2's special production watch, which was worth about Kshs. 50,000. They ate all the food the party had carried for the picnic.

3. The attackers tied the men together, while the two ladies were taken to a different room. PW2 could hear the ladies screaming. It was now going to 6.30 p.m. and getting a bit dark. Eventually the ladies were brought back and PW2 noticed they had been assaulted. The ladies were bundled in K K's car, while the men were bundled in M's. The robbers drove about 300 metres to the compound on Roberto Bronziro [PW1]. It was about 7.00 p.m. and getting dark. The gate was locked. Bronziro saw the group and thought they were his visitors. The robbers ordered their victims to go to the bedroom. The victims were made to sit on a bed in the bedroom, as the robbers started consuming alcohol which they found in the residence. They gagged their victims' mouths with bits cloths. The 4<sup>th</sup> Appellant took a hat from PW2. The robbers then took off. Bronziro untied himself and the others. The robbers had locked the house from the outside. K was pushed through an opening on the roof and together with Bronziro got a tool box and broke the door. They also came with other people from Diguna. The Mercedes Benz was there, but the Land Rover had been driven off by the robbers. The two ladies had been raped and were taken to Nairobi Women's Hospital. The crime was reported to Rongai Police Station. PW2's car was found abandoned near the Rongai Police Station. Later on after about two weeks, PW2 was able to identify 2<sup>nd</sup> and 3<sup>rd</sup> Appellants at a parade conducted at Rongai Police Station. He picked out the 4<sup>th</sup> Appellant at Kileleshwa Police Station in a similar parade. He testified he had problems identifying the 1<sup>st</sup> Appellant at the parade as the 1<sup>st</sup> Appellant appeared to have a problem with his nose. PW2 nonetheless identified the 1<sup>st</sup> Appellant on the dock.

3. Roberto Bronziro [PW1] told the Court he is a missionary with Coupon Missionaries, resident at Rongai. On 12<sup>th</sup> March 2006 at around 5.30 p.m. he was at his home in the company of Benjamin Mwangi, who lived with him. He saw a person who was dressed like a Masai, standing outside the compound. PW1 and his colleague were harvesting rain water. While bending, PW1 saw someone point a pistol at him. The assailant was taller than PW1, dressed normally, and had a Masai scarf over his shoulders. M's car drove into PW1's compound. It had three occupants. One of the men came out holding a pistol and ordered Benjamin to open the gate. Benjamin obliged. PW1, Benjamin and the other victims were ordered into the house and asked to sit on the floor. The robbers demanded for money from Bronziro. He gave them Kshs. 15,000 from his pocket. They demanded for more. They stole his two mobile phones valued at Kshs. 13,000, DVD, 20 CD movies, 3,000 Euros, 3,000 US Dollars, assorted clothes, and a lighter, all valued at Kshs. 0.5 million. Six white men and a black man were soon brought in by three other men. They were huddled into Bronziro's bedroom. The assailants went around the house ransacking it. They took PW1's wrist watch. They stayed in his house for about four hours. They ordered Benjamin to put on the generator as the residence did not enjoy electric power supply. Benjamin did so. The robbers left at around 10.00 a.m. The light from the generator was not very bright. Bronziro is diabetic and his condition worsened. He felt like he was going into a coma. The robbers had locked the house from the outside. One of the victims made an opening through the Makuti [coconut tree leaf-thatched] roof, and opened the door. The robbers left in M's car. Bronziro was not able to identify any of the Appellants at a parade held about three months later. He testified that he had already forgiven his assailants. Nothing stolen from him was recovered.

4. K K [PW3] testified he too is a Missionary, resident of Masai Lodge. He was in the picnic as narrated by [PW2] above. B S was celebrating her birthday on the material day. The attackers emerged from the bushes. They were about seven men. The one who approached K had a pistol. He said to K, "this is no joke!". The picnickers were ordered to sit down and give the attackers money. K lost his wedding ring, wrist watch and Sony video camera. K and his wife also lost a pair of binoculars. At least three attackers had guns. They were singing, "life is sweet and death comes soon." The attackers stayed with their victims for two hours before darkness fell. The robbers took the picnickers to K's house at around 6.00 p.m. They tied the victims' limbs and ate their victims' food. They took the two ladies away, while one attacker remained guarding the victims. He was a tall guy. K heard his wife and B scream from an adjacent room. The ladies later joined the men. All of them were untied and escorted to K's and M's cars. They drove to the residence of Roberto Bronziro. It was already dark. The generator was on and there was light in the house. The robbers took their victims to the bedroom, and ransacked the house. They gagged the victims and tied their limbs. They stole electronic goods from Bronziro. The robbers then left in M's car. K was able to untie himself, get out through the roof and open the door for the others. The ladies had been raped and were taken to hospital. Mrs. K was robbed of her wedding ring, necklace and watch. PW3 was later called to an identification parade. He was able to identify the 4<sup>th</sup> Appellant as the robber who emerged from the bush and pointed a pistol at him.

5. This evidence of the three complainants was supported by PW4 U K. PW4 testified she identified 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Appellants. PW4 and B were raped in turns. The 2<sup>nd</sup> Appellant, the 3<sup>rd</sup> Appellant, and another robber who was not brought to Court, all gang-raped U. They were eventually driven to Bronziro's. The robbers stole more items from this house while their victims' limbs remained tied. The robbers left in M's car, while their victims freed themselves and sought medical and police assistance. She was able to identify the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants at two different identification parades. PW5 Benjamin Mwangi corroborated the evidence of Bronziro [PW1]. He was not able to identify any of the attackers at the two identification parades he attended later. He however affirmed the Appellants were the attackers during the trial. PW7 Mrs. M M confirmed that the picnic took place as stated by her husband. They were attacked by robbers. The 4<sup>th</sup> Appellant was the first to emerge from the bush. They were armed with pistols, and stole their victims' mobile phones, rings, ear-rings and money. She saw seven robbers. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were there. 1<sup>st</sup> Appellant peeped under B blouse. The 3<sup>rd</sup> Appellant was a bit friendly. The 4<sup>th</sup> Appellant was accompanied by another robber who resembled him. U and B were taken away by the robbers and brought back in tears. They were moved to Bronziro's. The robbers stole more items there and locked their victims before leaving. She did not attend identification parades as she had travelled to Germany. PW8 Benson Nzioka worked as a gardener at Masai Lodge. He was accosted by the 4<sup>th</sup>

Appellant with a pistol and asked to open K's house. The 4<sup>th</sup> Appellant had covered himself with a Masai scarf. He was led to the picnic site where he found K and the other victims and four other robbers. Benson was robbed of a Motorola C116 phone and wrist watch. The robbers ate their victims' food. He witnessed B and U being led away from the rest of the group, and return in tears. He identified the 2<sup>nd</sup> and 4<sup>th</sup> Appellants.

6. The 1<sup>st</sup> Accused was arrested by PW9 on 15<sup>th</sup> May 2006. He informed the arresting Officer he had an accomplice nicknamed 'Teko.' This turned out to be the 3<sup>rd</sup> Appellant who was arrested the same day. The two were being investigated over another offence which was prosecuted separately from the trial subject matter of this Appeal. The 3<sup>rd</sup> Appellant in turn led CID Officers, led by PW10, to the 2<sup>nd</sup> Appellant. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants led PW10 to a house in Kibera Kianda, where they recovered a Ceska Pistol S/No.B.T.O86 with 25 rounds and two magazines in the possession of one Vicky Odhiambo. Vicky Odhiambo was charged in a separate trial. PW11 took photographs of motor vehicle registration KAP 855 W, a Land Rover Discovery, on 13<sup>th</sup> March 2006. He availed to the Court these photographs, exhibits 4A and B respectively. PW12 conducted the identification parade where U K identified the 1<sup>st</sup> Appellant as one of the attackers. PW13 confirmed she conducted the identification parade where U picked out the 2<sup>nd</sup> Appellant as one of the robbers. PW14 conducted the identification parade where three witnesses B S, M M and Benson Nzioka were required to identify suspects. M identified the 2<sup>nd</sup> Appellant. B identified the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Appellant. Benson Nzioka identified the 3<sup>rd</sup> Appellant. PW16 carried out identification parade with respect to the 4<sup>th</sup> Appellant. He was identified by PW3 K K. He was likewise identified by U K. According to PW16, M M also identified the suspect who started weeping asking, 'why are they picking on me?' PW17 testified that he arrested the 4<sup>th</sup> Appellant upon information given to the police by another suspect named Githeu. PW18 the Investigating Officer confirmed the narrative given by the other prosecution witnesses.

7. The Appellants were placed on their defence. 1<sup>st</sup> Appellant gave sworn evidence, while his colleagues gave unsworn statements. None called any witness. The **1<sup>st</sup> Appellant John Kariuki Mwangi** confirmed that he was arrested by Police Officers from a Matatu vehicle near the City Mortuary, on 14<sup>th</sup> May 2006. He was put in a police car, where he found another man who was a stranger to him. His blood sample was taken by a doctor at Rongai Police Station. Later, the complainants were called by the Police to identify the suspect. The 1<sup>st</sup> Appellant protested at the manner in which the parade was conducted, other persons called to participate being older than him. The other participants did not resemble him. U claimed the 1<sup>st</sup> Appellant raped her. The doctor who treated her testified the 1<sup>st</sup> Appellant's blood was not traced in U's body. The **2<sup>nd</sup> Appellant Joshua Omusa Nyanga'u** stated he was on his way home after visiting his ailing grandmother. Four Police Officers arrested him. He confirmed that identification parades were conducted, where PW2, PW4, PW5 and PW7 identified him. PW6, the doctor who treated the ladies who were allegedly raped, told the Court he did not find his spermatozoa or blood traces in the person of the victims. The **3<sup>rd</sup> Appellant Kennedy Otieno Juma** stated he was refreshing himself at York House in the City Centre Nairobi, when Police Officers arrested him. Two identification parades were carried out at Muthangari Police Station; no witness identified him. At Ongata Rongai Police Station, four parades were conducted; no one picked him out. PW2, PW4 and PW5 only identified him on the dock. U told the Court that the people, who robbed, also raped. The doctors who treated her testified they did not find his body fluids in her. There was nothing to link him to the alleged rape. Identification parades took place when the witnesses' memories were fresh; they ought to have identified the 3<sup>rd</sup> Appellant then, not on the dock. The **4<sup>th</sup> Appellant Jamil Ochieng' Asunah**, stated he travelled to Busia in Western Kenya to buy bhang. It took him four days to purchase and load the bhang for transportation. He was arrested by the D.C.I.O Inspector Njoroge and PC Kimeu in April 2006. The Police Officers took him to his residence where they recovered the bhang. He was booked at Rongai Police Station for the offence of being in possession of narcotics, and also on suspicion that he was involved in the robbery. Several white persons were brought to the Station and failed to identify him as being involved in the robbery. Inspector Njoroge and PC Kimeu then asked the 4<sup>th</sup> Appellant to pay them a bribe of Kshs. 100,000. His relatives were able to raise Kshs. 40,000. He was released after the DCIO photographed him, and warned that he would ruin the 4<sup>th</sup>

Appellant if he did not raise the balance of Kshs. 60,000. In the Nation Newspaper of 9<sup>th</sup> August 2006, police published the 4<sup>th</sup> Appellant's photograph, alleging him to be a most wanted criminal. He was arrested on 12<sup>th</sup> August 2006. He was tortured, and paraded, where the same white people who had failed to identify him in April, now claimed to identify him as one of the robbers.

8. The trial Court found that the offences were committed by the same people at the same time. The complainants took considerably long time with the attackers and had ample opportunity to identify them properly. Identification forms showed each Appellant was identified by more than 2 witnesses. There was daylight when the attackers struck, and also generator light in the house of Bronziro. The attackers had not covered their faces, and therefore it was possible to identify them. The identifying witnesses did not know the Appellants, and had no reason to implicate them. With regard to the 4<sup>th</sup> Appellant, the Court was not persuaded that he was arrested and prosecuted after failing to raise Inspector Njoroge's balance of the Ksh. 100,000 bribery. The 4<sup>th</sup> Appellant was identified by several witnesses as one of the attackers. The Court saw no possibility of error in any identification and rejected the testimonies of the Appellants as false and mere denial. The trial Court convicted the Appellants on all counts and sentenced them to suffer death. The sentences with regard to count 2 and 3 were kept in abeyance.

9 The Appellants have challenged the decision of the Lower Court and relied on the following grounds in their Petitions of Appeal:-

- a. **The trial Court erred by relying on identification that was not free from error;**
- b. **The trial Court erred by relying of a defective charge sheet;**
- c. **The facts and circumstances of the case were not shown to be incompatible with the innocence of the Appellants;**
- d. **Appellants stated from day 1 of the trial that they only understood Kiswahili, but the trial proceeded in English without the benefit of an interpretation; and**
- e. **The Appellant's testimonies in defence were not sufficiently considered.**

10. The Appeal was heard on 14<sup>th</sup> October 2013. The 1<sup>st</sup> Appellant submitted that all the witnesses stated they did not identify him. The witnesses only alleged to identify him on the dock. There was no forensic evidence to tie him down to the offence. Count 1 stated the Appellants were armed with pistol. Count 3 stated they were armed with dangerous weapons namely pistol. Mr. Ondieki for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant submitted there was no description of the Appellants given in the first report to the police, by the complainants. Counsel urged the Court to adopt the decision of the *Court of Appeal at Nairobi in Criminal Appeal Number 194 of 1985 between Wanjohi and 2 Others v. the Republic [1989] KLR* where the Court ruled that the question of accuracy in identification must be beyond reasonable doubt. The charge sheet was defective, giving the registration of the vehicle as KAP 855 W. The evidence of PW2 was that the car was registration number KAP 955W. On this ground the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants relied on the authorities of *Court of Appeal at Nairobi Criminal Appeal Number 1 of 1983 between Yongo v. the Republic [1983] KLR and Mombasa High Court Criminal Appeal Number 317 of 1998 between Juma v. the Republic [2001] KLR*. The evidence against the Appellants was circumstantial. The Court was invited to adopt the principles laid down in *Nakuru Court of Appeal Number 33 of 1983 between James Mwangi v. the Republic [1983] KLR* which are: to justify the inference of guilt, facts must be incompatible with the innocence of the accused and secondly, there must be no other co-existing circumstances which would weaken or destroy the inference. DNA analysis did not support the allegation that the Appellants raped the U and B. If the trial Court found there was doubt that the Appellants committed the offence of rape, there was no basis of convicting on robbery. The offence of rape should not have been charged together with that of robbery with violence. Prosecution witnesses were inconsistent and contradictory. The Appellants stated from day one of the trial that they only understood Kiswahili; the trial was conducted in English without the benefit of Kiswahili interpretation in violation of Section 198 of the Criminal Procedure Code and Section 77 of the retired Constitution of Kenya. The 4<sup>th</sup> Appellant adopted the submissions of his Co-Appellants adding that details of the stolen items in the charge sheet differed with the details given by the prosecution witnesses in their respective evidence. He also stated that he was charged after his Co-Appellants, and was not named in the charge sheet on the counts for which he was convicted. He repeated the allegation he made against Inspector Njoroge in the

Lower Court that he solicited for a bribe from the 4<sup>th</sup> Appellant and charged then 4<sup>th</sup> Appellant with the offence of robbery with violence and rape, after the 4<sup>th</sup> Appellant defaulted on the bribery obligation.

11. The Senior Assistant Director of Public Prosecutions Mr. O'mirera, urged the Court to reject the consolidated Appeals. There was no dispute the complainants were robbed on the material night. PW2, PW3, PW4 and PW8 clearly identified the Appellants as their attackers. Although the witnesses were traumatized, they stayed with the robbers from 4.00 p.m. to 10.00 p.m. long enough to be able to identify the robbers. Witnesses were raped and held hostage for hours. The robbers ate and took drinks from the complainants, and the witnesses had all the time to observe the robbers. The case of **Wanjohi v. the Republic** was distinguishable as it related to witnesses who only had fleeting glances at their attackers. Giving a first description to the police is not a prerequisite in identification, and each case must be treated on its own circumstances. Forensic evidence is very important. DNA evidence is affected by how it is collected and retained from A to Z. The error in the charge sheet was merely typographical. Section 382 of the Criminal Procedure Code states that the Appellants would have to show they suffered prejudice as a result of the error. They suffered no prejudice and they never raised any objection as the trial unfolded. The photographs of the vehicle were produced before the Court. The Appellants had common intention when they robbed and raped. There were no fundamental inconsistencies in the chain of evidence and if any are recorded, they are too weak to have any effect on the decision. All the Appellants participated in the proceedings and understood the language used. They cross-examined the witnesses satisfactorily, which would not be the case if they did not understand the proceedings. The State asked the Court to uphold the verdict of the Lower Court.

12. We are required as the first Court to which the Appeal has been submitted, to re-evaluate the evidence and make our own conclusions, as established in the case of **Shantilal M. Ruwala v. the Republic [1975] E.A. 570**. This role goes beyond mere scrutiny of the evidence adduced at the Lower Court; we must re-evaluate the evidence, reach our own findings and conclusions, while cautioning ourselves that the trial Court had the advantage of seeing and hearing the witnesses in person.

13. The record from the Magistrate's Court indicates on the first day that interpretation was English/Kiswahili. There was no record of the language in use in subsequent proceedings. In **Diba Wako Kinyato v. the Republic [1982-88] 1 KAR 1974**, the Court of Appeal stated that, "it is the fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom proceedings shall be interpreted in a language he understands." The Court was relying on Section 77 [2] [f] of the old Constitution of Kenya and Section 198 [1] of the Criminal Procedure Code. The Appellants herein participated fully in their trial. They did not raise the issue of interpretation in the Lower Court. They cross-examined witnesses at length. They did not remain mute when called to answer to the charges. They did not stay silent when called to defend. In the **Court of Appeal at Kisumu Criminal Appeal Number 460 of 2008 between Charles Omwenge Matoke v. the Republic**, the Court found the Appellant's constitutional right under Section 77 [2][f] not to have been violated. The Appellant was found to have understood and participated in the proceedings and not in any way prejudiced. This is the case with the four Appellants in this Appeal; they understood and participated in the proceedings. They were not prejudiced. The Court however observes that the trial Court should have recorded what language was in use after the first day, and whether any interpretation was made. The omission in the record nevertheless, cannot lead the Court to the conclusion that a fundamental breach of the Appellant's constitutional rights occurred. This ground of appeal fails.

14. Section 135 [1] of the Criminal Procedure Code states that, "any offences, whether felonies or misdemeanours may be charged together in the same charge or information if the offences charged are founded on the same facts or form or are part of a series of offences of the same or similar character." The Court highlighted this provision in the **Court of Appeal decision of George Otieno Akula v. the Republic [2013] e-KLR**. In determining whether the joinder of the offences in the same charge sheet is faulty, the Court looks at whether the offences were of similar import. The conduct of the accused person is relevant. In this case, the Appellants were alleged to have a common intention. The offence of rape was part of the same violent conduct in an offence of robbery with violence. There was a single state of mind, based on the same conduct. Rape was essentially part of the violent conduct attributed to the attackers in carrying out the robbery. The offences were committed with the same animus, against the same victims.

We do not think that there was any fundamental defect in joining the offence of robbery with that of rape.

15. The charge sheet was nonetheless defective in other details. The evidence given by the prosecution materially departed from the particulars of the charge sheet. Count 1 stated that the Appellants robbed M M a Land Rover, registration number KAP 855 W. M himself gave the registration number as KAP 955 W. He testified his car is a Land Rover Discovery, as opposed to a Land Rover. His wife M was not able to recall the registration number of her husband's car. Count 1 of the charge sheet stated the 'while armed with pistol' robbed M M....' The pistol is not described in the language of the statute, Section 296 [2] of the Penal Code, as a dangerous or offensive weapon or instrument. The items stolen from M [PW2] were listed on the charge sheet as Land Rover registration KAP 855 W, one golden ring, and cash of Kshs. 2000- all valued at Kshs. 2,017,000. In his evidence, M testified he also lost a special wrist watch worth about Kshs. 50,000 and also lost his hat. PW1 Roberto Bronziro was alleged in the charge sheet to have lost 2,800 US dollars, 3 cameras, two Casio watches, one Siemens mobile phone, one DVD player, one movie CD, clothings and cash of Kshs. 7,000. In his evidence, Bronziro testified he lost Kshs. 15,000, 3000 euros, 3000 US dollars, and a Zippo lighter. His evidence and the charge sheet gave substantially different details of items stolen from him. He does not seem to have mentioned loss of 2,800 US dollars, 3 cameras and two Casio watches in his evidence before the Court. He testified he lost 20 CD movies, while the charge sheet says one CD movie was stolen. K K [PW3] in the charge sheet lost one hundred golden finger rings, one video camera and one Nokia mobile phone. His evidence mentioned no loss of a Nokia mobile phone and no one hundred golden finger rings. He testified to have lost a wrist watch, which is not part of the charge sheet.

16. The 4<sup>th</sup> Appellant was charged much later after his Co-Appellants. He submitted that he was not named in Counts 1, 2 and 3 in the charge sheet, Counts which he was convicted for. There is nothing on record to discount his submission. The charge sheet in the record availed to us, shows the 4<sup>th</sup> Appellant was only specifically named in Count 6 on Rape against B S and U K. He is not even named as an accused person in the title to the Judgment read by the Lower Court on 11<sup>th</sup> June 2009. The charge sheet was defective under Section 214 [1] of the Criminal Procedure Code. It did not accord with the evidence given by the complainants. Count 1 did not define the pistol as a dangerous or offensive weapon or instrument in the language of the statute. The 4<sup>th</sup> Appellant is not shown to have been named in the charge sheet on the counts of the offence for which he was convicted and sentenced. He is not even listed as an accused person in the Judgment subject matter of this Appeal. Miscarriage of justice was occasioned to the Appellants. The offence of robbery with violence requires that the complainant is dis-possessed of his property by his attacker. Such property must clearly be made known by the prosecution, shown to belong to the complainant, in order to afford the accused person reasonable chance to defend the accusation. A person who has not been named in the charge sheet has no reason to take a plea, be prosecuted, defend and be adjudged for the commission of the offence. Relying on the cases of *Yongo v. the Republic and Juma v. the Republic* cited above, the Court agrees with the Appellants that the charge sheet was fundamentally defective and the defect resulted in a miscarriage of justice. The defects were expansive and went to the core of the trial, and could not be redressed through Section 382 of the Criminal Procedure Code as submitted by the State. This ground succeeds.

17. The reliability of the identification evidence was disputed by the Appellants. Courts have an obligation to weigh the factors that may reasonably undermine a fair identification process. Identification can be tainted through a flawed process and become the product of suggestibility or contamination. In many cases, the witness's desire to please the police, the expectation that the police have the guilty party, and the witness's desire to feel safe or have the guilty party punished, are ideal combination for priming witnesses to choose a suspect from a line up. Courts must therefore be fully convinced that evidence of identification is free from error, suggestibility or contamination. In *Wanjohi & 2 Others v. the Republic* the question that must be answered by the trier of the facts is whether the Appellants were identified beyond reasonable doubt.

18. PW1 Roberto Bronziro testified that he was called for an identification parade; he did not identify anybody. He said he could not for sure say the Appellants were the persons who robbed him. PW2 M M stated he attended three identification parades. He could not identify the 1<sup>st</sup> Appellant, because he had a

problem with his nose. He suggested that perhaps the 1<sup>st</sup> Appellant had fallen. M stated he was not 100% sure about the identity of the 1<sup>st</sup> Appellant, because of his injury. At the hearing, PW2 stated he was now sure the 1<sup>st</sup> Appellant was among the attackers. PW2 also described the 3<sup>rd</sup> Appellant's face as swollen and lips hanging during the parade. The witness suggested again in Court that he was now 100% the 3<sup>rd</sup> Appellant was among the robbers. PW3 K K did not identify any suspect at two parades conducted at Kilimani and Ongata Rongai Police Stations. He identified one person at a Police Station whose name he could not recall. This person was the 4<sup>th</sup> Appellant. He could not remember the type of clothing he was wearing. PW3 testified he also identified the 1<sup>st</sup> Appellant, while at the same time testifying he did not identify the 1<sup>st</sup> Appellant at Kilimani Police Station because the 1<sup>st</sup> Appellant's face was swollen. He was not 100% sure about the identity of the 1<sup>st</sup> Appellant. He did not give a description of the attackers to the police in his first report. PW4 U K stated she identified the 1<sup>st</sup> Appellant, 2<sup>nd</sup> Appellant and 4<sup>th</sup> Appellant. She was unable to identify the 3<sup>rd</sup> Appellant because his face was swollen. She recorded her statement with the police two days after the attack, but did not give the police a description of the attackers. PW5 Benjamin Mwachhi Moses stated he went twice to Rongai Police Station, but was not able to identify any Appellant. He however stated in the trial that he saw the four Appellants at the time of the robbery. PW7 Martha M testified she traveled to Germany on 30<sup>th</sup> April 2006. She came back in August 2006 to see the suspects in Court. She was in Germany and did attend any identification parade. She attended one identification parade when she came from Germany but was in shock, and did not identify anyone. PW16 Chief Inspector Okwachi however testified that M M identified the 4<sup>th</sup> Appellant at an identification parade held on 15<sup>th</sup> April 2006. He also testified that the 4<sup>th</sup> Appellant's hair was plaited, while the other paraded persons had un-plaited hair.

19. This evidence of identification was not free from error, suggestibility or contamination. The witnesses did not give to the police description of their attackers in their initial reports. They repeatedly stated they were not 100% sure of the identity of their attackers, that is, until they saw them on the dock. Worryingly, both the Appellants and the identifying witnesses allude to injuries inflicted on the Appellants before the identification parades. Some Appellants had swollen faces, swollen noses and hanging lips. It would be difficult for the police to ensure a fair parade is held, if the suspect has visible disfigurement from whatever source. It would not be possible in such a case, to ensure the participants in the parade are of similar general appearance. It is not likely that police managed to get persons with swollen faces, swollen noses and hanging lips to the various parades. The witness is likely to register such a disfigured face as the face of the guilty person, so that in subsequent parades or in Court, after the person is sufficiently repaired, the witness may allege to pick out the person as one of his attackers. The identification of the 4<sup>th</sup> Appellant left a lot to be desired. He had been arrested in April on allegation of bhang possession and on suspicion of being involved in robbery with violence. During the initial arrest, he alleged some white people, including some of the complainants in this matter were called to an identification parade. The robbery took place in March, and it is not unbelievable that in the following month, the complainants were asked to identify the 4<sup>th</sup> Appellant. The witnesses did not identify the fourth Appellant and he was set free by the same Police Station that was investigating the robbery. He was only rearrested in August 2006, five months later. The DCIO Ngong' who is based at Ongata confirmed he took the 4<sup>th</sup> Appellant's photograph before releasing him back in April 2006. His photograph was published in the Daily Nation of 9<sup>th</sup> August 2006 as a most wanted criminal, three days before his re-arrest on 12<sup>th</sup> August 2006, and six days before the identification parade carried out by PW16 where M M, M M and U K allegedly identified the 4<sup>th</sup> Appellant as one of the robbers. The timing of the circulation of the 4<sup>th</sup> Appellant's photo as a most wanted criminal, his arrest two days later and identification parade six days later cast a lot of doubt on the objectivity of the identification process. It was not a process free from suggestibility and contamination.

20. With all the prevarication of witnesses and inconsistencies in the identification evidence, we find the evidence of identification to have been unreliable. As stated in the *Court of Appeal of Kenya Criminal Appeal Number 51 of 2004 between Elizabeth Gitiri Gachanja & 7 others v. the Republic [2011] e-KLR*, evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt. If evidence is on identification of a person who says he was not properly identified, the

Court must examine such evidence with the greatest of care before relying on it to convict. This principle is restated in the cases of **Wanjohi & 2 Others v. the Republic and Juma v. Republic** discussed above, and in a catena of other judicial authorities. The parades did not conform to Chapter 46 Force Standing Orders regulating identification parades. In sum we find the challenge with regard to the identification evidence sustainable.

21. The last two grounds in the Appeal relate to the treatment of circumstantial evidence and the defence testimonies. We shall deal with these simultaneously. The Appellants submitted and we agree that they were convicted on circumstantial evidence. The State opted to join the offence of rape with that of robbery. The Court has given the view that this was within the discretion of the State. The two offences are made up of different elements which must be established to justify a guilty verdict. The State considered the offences were part of the same transaction, carried out by the same people, with the same state of the mind. They were offences committed with the same animus, against the same victims. The failure in evidence on the allegation of rape was a forensic failure. It did not link the Appellants to the offence of rape. Their saliva and blood samples were taken and examined, and not matched to the DNA profile of the rape victims. This evidence would at the very least suggest to the fact finder that the Appellants were not at the scene of the rape, and as the Court concluded, did not commit the offence of rape. It ought to have raised reasonable doubt, as to whether the Appellants therefore, were the robbers. Once the charge of rape failed on very strong scientific basis, the charge on robbery became shaky as against the Appellants who were charged with rape. Mr. O'mirera suggested that the failure may have been occasioned by the handling of the forensic evidence from the beginning. Mishandling of such evidence was not in issue at the trial, and it is the duty of the police to ensure forensic evidence is properly collected, analyzed and preserved. Other failures in forensic evidence relate to the motor vehicle identified by the police to belong to M, whose registration was given as KAP 855 W. The Investigating Officer stated at page 100 of the proceedings that on 13<sup>th</sup> March 2006, the motor vehicle was dusted by the scene of crime officer. There was no actual evidence of the dusting results availed to the trial Court, and the particular scene of crime officer did not give evidence. This default, seen against the failure of forensic evidence on the rape charge, was significant. Forensic evidence is never wholly absent; only human failure to find it, study it, and understand it, can diminish its value. In the case of **Bukenya v. Uganda [1972] E.A.**, the Court stated that the prosecution have an obligation to bring all witnesses necessary to establish the truth. Where evidence called is barely adequate, the Court may infer that evidence of the uncalled witnesses would have tended to be adverse to the prosecution.

22. The physical and testimonial evidence before the Lower Court against the Appellants did not assist in reconstruction of the scene of the crime, or place the four Appellants beyond reasonable, doubt at the scene of the crime. The Court dismissed their respective evidence in defence off-handedly. The defence of the 4<sup>th</sup> Appellant revolving around his dealings with the DCIO Inspector Njoroge in particular, deserved to be treated with greater care. In the end-:

***[a] The Consolidated Appeals by all the 4 Appellants are allowed;***

***[b] Conviction is quashed and sentence set aside; and,***

***[c] The Appellants are forthwith set at liberty, unless otherwise held for lawful cause.***

Dated and delivered at Nairobi this 18<sup>th</sup> day of November 2013

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Monica Mbaru

Judge

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James Rika

judge