REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.561 OF 2000

JOSEPH KARAITA KAMAU KAMATA…...1ST APPELLANT

(Original Accused No.1)

V E R S U S

REPUBLIC……...…RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.560 OF 2000

BAMBANYA KONDE RANDU……...…….2ND APPELLANT

(Original Accused No.2)

V E R S U S

REPUBLIC…….RESPONDENT

A N D

CRIMINAL APPEAL NO.566 OF 2000

ATHMANI ABDALLAH ALI……...3RD APPELLANT

(Original Accused No.3)

V E R S U S

REPUBLIC……..……..RESPONDENT

A N D

CRIMINAL APPEAL NO.559 OF 2000

PETER IRERI NJERU…….4TH APPELLANT

(Original Accused No.5)

V E R S U S

REPUBLIC……..RESPONDENT

JUDGMENT OF COURT

The above appeals were consolidated at the hearing. 1st Appellant was 1st Accused, 2nd Appellant was 2nd Accused, 3rd Appellant was 3rd Accused and 4th Appellant was 5th Accused. The Appellants were jointly tried in the lower court before S.P.M., J. Manyasi at Malindi, for two counts of Robbery with Violence contrary to Section 296(2) of the Panal Code.. They were also tried for Rape contrary to Section 140 of the Penal Code each as well as Unnatural Offence, contrary to Section 162 of the Penal Code.

They were further charged and tried for an alternative offence of the Indecent Assault contrary to Section 144(1) of the Penal Code. They were convicted of the two counts of Robbery with Violence and sentenced to death and of the several counts of Rape and Unnatural Offence they were also sentenced to various prison sentences as shown in the lower court judgment. They all, separately appealed to this court on both conviction and sentence. As the facts upon which they were convicted arose from the same trial, the court on request by the State Counsel consolidated the appeals at the start of the hearing of the same.

We have examined the grounds of appeal of the several Appellants and are of the view that they are similar in all the material aspects and the court will consider the grounds of the Appellants together. The facts of the case are that the two complainants who are husband and wife were visiting Malindi during their honey-moon and were residing in Mbuyuni House where their host had accommodated them. In the night of 24th October, 1999 about 10.30 p.m., they were attacked by a group of people, most of who were masked but composed both of African and Arabic decent. The attackers demanded for money which the complainants did not give.

The attack lasted about ¾ of an hour during which the complainants Mr. and Mrs. L were assaulted with pangas, rungus and stones and as a result they sustained various bodily injuries some of them serious. Most of the injuries can be viewed in the photographs produced in the trial as Exhibit 6. Mrs. L,was raped by three of the attackers as well as sodomised by one of them. It is in evidence that when rescue came Mrs.L had barely managed to climb over the neighbouring wall to the next house and that the three workers who lived in the servant quarters had done little to help alert neighbour for help except one of them who finally climbed over the wall and ran to report to the Police.

When the Police and security guards arrived, a lot of damage had been inflicted and little was really accomplished at that stage to stop the torture undergone by the complainants. The Police started investigations immediately as the complainants received initial medical treatment first at Malindi and soon after in the morning in Nairobi Hospital where the complainants were flown to in the night towards morning. It is in evidence that in the morning of 25th October, 1999 PW.13, No.44409 Pc Gilbert Waithaka of Malindi Police Station on crime branch duties, who had visited the scene of crime the night before contacted the 2nd Appellant.

It is in dispute by the 2nd Appellant whether he was found near Tropical village which is an abandoned old house under suspicious circumstances or elsewhere where he was cooking a meal. However, he ended up guiding the Police led by PW.13, to the house of 1st Appellant where the 3rd Appellant was found sleeping. The 3rd Appellant declared that he was not the owner of the house but was willing to lead the Police to where the 1st Appellant was. He led the Police to the house of 1st Appellant's girl-friend who was later charged as Accused 4 but was found not guilty by the trial court. There the Police, at about 10.15 a.m. found the 1st Appellant and his girl-friend locked in.

The Police searched the house and picked several items of which were a broken frame of spectacles and a bunch of keys, both of which became crucial exhibits in this case. It is in evidence that the spectacles were later identified by the complainants to be those of Mrs.L which were forcefully or ripped from her face by one of the attackers the night before. The bunch of keys was also later identified by several witnesses, including the owner of Mbuyuni house, his workers and the complainants to be the keys for the

doors of the Guest House in which the complainants were attacked. There are other events that must be mentioned. The first one is that the Police investigator took saliva and blood samples for forensic tests.

Those of Mr.L and vaginal and anal swabs of Mrs.L were taken for further tests. So were the under-wears of all the four Appellants. Second, Mrs.L statement of facts was taken by a Scotland Yard Police Office in England and that the same was produced in evidence during the trial at the lower court without Mrs.L personally adducing evidence. She states in the judgment appealed from that she admitted same not really to prove the facts contained therein but to prove the fact that she had reported the events of the alleged rape and robbery to the Police.

The third point is that virtually all the Appellants were arrested as a result of the 2nd Appellant's information and his leading the Police to their places either of residence or work. The 2nd Appellant explained this by stating that he was asked by the Police to help them with such help as a Police informer but not as one of the attackers and that all he did was guide or lead the police to where he knew offenders or law beakers hide. The fourth point is that only the spectacles and the bunch of keys among the items forcefully or violently stolen from the complainants were recovered and identified by the complainants and other witnesses. The fifth point is that neither the complainants nor the other witnesses who gave evidence identified the complainants' attackers that night despite the fact that the attack took about 45 or 50 minutes and that conditions of identification like electric light etc were positive.

We have carefully perused the judgment of the trial Magistrate and have considered the evidence upon which she based the convictions. We have also together considered the grounds of the appeals. The consolidated grounds of the appeals are:-

a) That the trial Magistrate erred in convicting upon the evidence of coaccused persons, whose evidence was presumed to be accomplice evidence that needed corroboration.

b) That the trial Magistrate erred in relying and convicting upon the evidence of Mrs.L who was never called as a witness and whose statement of facts was wrongly admitted.

c) That the trial Magistrate erred in law in relying and basing convictions on the 2nd Appellant's statement under inquiry.

d) That the evidence of recent possession in relation to Mrs.L'S spectacles and Mbuyuni Guest House door keys was not adequately proved to form a basis for the principle of recent possession.

e) That the trial Magistrate erred in positively relying upon medical evidence which was vague and inconclusive.

f) That the trial Magistrate erred in convicting the 2nd Appellant merely on the fact that he led the Police to the other Appellants and their whereabouts.

g) That the totality of the evidence upon which convictions were based, did not exclude the possibility of any other explanation that would be innocent.

h) The evidence upon which the trial Magistrate based the convictions lacked the necessary credibility and thus failed to prove the charges beyond a reasonable doubt.

These are the grounds of appeal that we now turn to consider. Each of the Appellants argued that the trial Magistrate erred in law in convicting upon an accomplice evidence. This was in reference to the evidence of the Accused 4 in the lower court who ended up being acquitted but whose evidence had confirmed that the 1st Appellant returned to her house late in the night on 24th October, 1999. This was the date when the robbery and rape was committed. In the statement on oath in her defence, she stated at page 80 of the proceedings that the 1st Appellant in the material night returned to her house at 9 p.m. accompanied by the 3rd Appellant. She cooked and gave them food.

After eating the two left her house. There is no evidence of where they went but 1st Appellant told her that he would come back to sleep in her house. She did not enquire as to where the two were going at that hour of the night. But she went to sleep until late in the night when the 1st Appellant indeed returned to sleep. She let him in to the house through the rear door. She noticed that he was alone and was chewing miraa and gum. But he did not go to sleep straight away but took off his clothes which he put on a stool or table and proceeded to drink wine and chew more miraa. She went to sleep apparently leaving him still seated. In the morning the Police led by No.44409 Pc. Gilbert Waithaka, PW.13 woke them up accompanied, inter alia, by the 2nd Appellant. When the latter entered the room, they made a search of the same.

The result of the search was that Pc. Waithaka found and took into his possession a bunch of keys and spectacles which were in the 1st Appellant's trousers pockets. What is important about these two items i.e. a bunch of keys introduced in evidence as Exhibit 3 and the spectacles also put in as Exhibit 4, is that they were later to be identified, the keys as those belonging and opening the Mbuyuni Guest House which had been forcefully and violently taken away from Mrs.L during that fateful night, and the spectacles also later to be identified by the Lightings as those belonging to Mrs.L and violently taken away during the same night by one of the attackers.

In her judgment the trial Magistrate on page 100 she considered and accepted the evidence of Salama Mutile Munga, Accused 4 at the lower court concerning the fact that the bunch of keys, Exhibit 3 and the damaged spectacles Exhibit 4, were on the 25th October, 1999 recovered from the 1st Appellant's trouser in her house, and that both items had been brought there by the 1st Appellant who was that night, wearing the trouser. And so, the Appellants argue, how can that be so when the 4th Accused was an accomplice? The question then is whether Accused 4 was an accomplice?

The trial Magistrate found that there was no evidence on the record to the effect that there was a woman among the attackers. They would have recognized a woman voice or otherwise. Furthermore, the evidence on record which none of the Appellants challenged was that the said Salama Mutile Munga never left her house that night; at least not with the 1st or 3rd Appellant. She described how she fed the 1st and 3rd Appellants early in the material night and went to sleep until the 1st Appellant returned to sleep in her house late that night. There is no suggestion anywhere that she knew or ought to have known what the two were planning when they left her house at 9.00 p.m. There is no evidence or even a suggestion that she knew where the 1st Appellant was coming from and what he was carrying in his trouser pockets when he returned. She saw him carrying a bunch of keys, some chewing gum and miraa but raised no questions and got no donation of answers.

These are facts the trial Magistrate considered before she concluded on page 102, that: "There is otherwise no evidence that she was involved in the two robberies as charged". We entirely agree that there was no evidence linking her with the robbery and rape that befell Mr. and Mrs. L that fateful night. We concur with her express and/or implied conclusion, that the 4th Accused's evidence was not evidence of an accomplice but one of an independent witness. The fact that she ended up being joined as one of the Accused was in our view a misjudgement on the part of the Police which does not alter the actual position as proven by evidence.

Furthermore, the trial Magistrate conjuncture on Page 102 that the said witness may have had reason to believe that the keys and spectacles were stolen or unlawfully obtained, is not borne by any evidence, especially when she concludes the same thought by categorically stating that there was no evidence that she was in any way involved in the crimes committed that night. Having then come to the conclusion that the trial Magistrate was right in concluding that the 4th Accused was an independent witness, who was not an accomplice or in a position of an accomplice, we further hold that her evidence did not require corroboration. But even if her evidence were to be held as not good or independent enough to be relied upon entirely, we think and hold that the evidence of PW.13 Pc. Waithaka was on the issue as to where and how Exhibits 1 and 4 were recovered, conclusive enough.

That is to say that they were found in the 1st Appellant's trouser pocket on the table in the 4th Accused's house. Indeed a careful perusal of the evidence will show that 4th Accused's evidence was merely re-

establishing the evidence of Pc. Waithaka on the issue of the recovery of the Exhibits 1 and 4. The same piece of evidence came also from PW.14 Pc. Jacob Wafula who stated under cross-examination that the 4th Accused had earlier confirmed that the said Exhibits were carried to her house by 1st Appellant on the late night of 25th October, 1999. As established by the trial Magistrate the evidence linking the 1st Appellant with the crimes complained of by Mr. and Mrs. L was the bunch of keys Exhibit 1 and spectacles Exhibit 4, both of which were, as concluded by the trial Magistrate and confirmed by this court, found in the custody of the 1st Appellant, only about 8 to 9 hours after they were violently taken away from Mrs.L in the course of violent robbery and an orgy of rape. It behoved the 1st Appellant to explain away the said recent possession of the said stolen items.

The 1st Appellant's defence was in a sworn statement which was cross-examined upon. Its effect was that the keys Exhibit 1 and the spectacles Exhibit 4, were not in his custody when they were recovered by Pc. Waithaka in 4th Accused's house. The trial Magistrate did not believe the 1st appellant's story. She believed as already shown hereinabove that the 1st Appellant carried the said exhibits in his trouser pocket to the 4th Accused's house where Pc. Waithaka recovered them from the next morning. That is why it was incumbent upon him to explain as to how he came into possession thereof. The correct position is that a person who is found in possession of stolen goods soon after the theft or robbery is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession to establish his innocence.

In this case the 1st Appellant denied having been in possession. The logical result therefore was that if the trial Magistrate believed that 1st Appellant was in possession, contrary to what he claimed then she had no alternative but to find that he had failed to offer an innocent explanation as to how he came by the two exhibits and that therefore he was one of the robbers who attacked Mr. L and Mrs.L that fateful night. We hold that the said conclusion was correct and we support it. 1st Appellant attacked his conviction in other several grounds of appeal which now we also wish to consider. Were the spectacles identified to be those of Mrs.L? On page 46 of Mr. L's evidence, he stated that Exhibits 1 and 4 were shown to him in photographs, among other items, and recognized the spectacle frames to be those of his wife which she wore the night of attack and which he had also identified at Nairobi CID Headquarters before they flew to England.

He also identified the bunch of keys as those of the bedroom in which the robbery took place. He confirmed that the keys were taken from his wife's pocket. The keys were also identified in the same manner by PW.4, Dickson Chivatsi Chiriba, a domestic worker who for several years cleaned Mbuyuni House and Guest House and knew the keys well. So did PW.1 Robert Cronchey, the owner of Mbuyuni House. And finally on this issue, PW.6 Claire Graham, a British detective who took part in the investigations identified Exhibit 4 which had earlier been identified to him at Malindi as spectacle frames belonging to Mrs.L. He went further and gave proof from the opticians in England of the brochures photographs of the same and of the receipt showing the date when the spectacles were bought. These are in evidence as Exhibit 7 and 8. We are satisfied and support the trial Magistrate's finding that the item Exhibits 1 and 4 were properly identified as those violently taken away by robbers on the material night.

The 1st Appellant also attacked the conviction on the ground that he was not allowed to cross-examine 4th Accused in her damning evidence. It is not disputed that the evidence adduced by Salama Mutile Munga 4th accused, in the lower court clearly incriminated the 1st Appellant. However, examination of the trial Magistrate's judgment, especially on page 99 of the same shows that she first and foremost relied on the evidence of PW.13 (typographically shown as PW.15 in error). As earlier hereinabove stated, we are of the opinion that in so far as the recovery of the Exhibits 1 & 4 are concerned, the trial Magistrate had sufficient evidence from PW.13 upon which she could rely to hold that the said exhibits were indeed recovered from the 1st Appellant. It was her finding on page 99 of the Judgment that the similar evidence from Accused 2, 3 and 4 was in support or only additional to that of PW.13's evidence.

We support this position and confirm that even without the evidence of Accused 2, 3 and 4, the trial Magistrate was entitled to find that the damning Exhibits 1 and 4 were found in the custody and control of 1st Appellant. With this conclusion, the correct legal position would be that where two or more prisoners are jointly indicted and evidence is called on behalf of one prisoner which tends to incriminate the

other(s), the latter is entitled to cross-examine on the incriminating evidence. The basis for this principle is that such evidence though given for the defence of one prisoner, becomes, in fact, evidence for the prosecution against the other(s). The position remains the same, where as in this case, the incriminating evidence is given not by a called witness, but by a coaccused. In the case of Edward s/o Msenga –vs- Reginam, in Criminal Appeal No.123 of 1956, reported in Her Majesty Court of Appeal for Eastern Africa at page 554, it was held as follows:-

"……..Although it is true that the prosecutor cross - examined the 2 nd Accused on most of the points on which the Appellant says he wished to cross -examine, we are unable to agree with the conclusion of the learned Judge that had the Appellant been allowed to cross-examine, there is no reason whatsoever to believe that the 2 nd Accused would have answered differently …….. We think that the failure to give the Appellant an opportunity to cross -examine the 2 nd Accused was a denial of his fundamental right which was fatal to the conviction ……."

We apply the above doctrine fully and would therefore think that the failure to give all the Accused in this case an opportunity to cross-examine the 4th Accused was no less prejudicial and was indeed a denial of fundamental rights of all the Appellants herein. The effect of this would be to allow the appeals on this ground but in this case and as we have noted above the trial Magistrate considered the evidence of the 4th Accused only in addition to other similar evidence from other independent witnesses including PW.13, and could have come to the same conclusion even if she were not to seek support from the evidence of the 4th Accused. We accordingly proceed to exclude the evidence of the 4th Accused in its entirety but nevertheless, in the exercise of this court's original jurisdiction in matters of fact, hold that the evidence of PW.13 and PW.14 was sufficient to establish the fact that Exhibits 1 and 4 were recovered from the possession of 1st Appellant.

When on 25th October, 1999 PW.13 visited the house of 1st Appellant and 4th Accused it is on record in his evidence that he was in company of other Police Officers who were not called to testify. The Appellants attacked this failure to call the other Police Officers as witnesses. PW.13 Pc. Waithaka gave credible evidence as to how he visited all those relevant places. None of the Appellants denied the fact that he visited them and arrested them except the 1st Appellant only in relation to the recovery of Exhibits 1 and 4. The trial Magistrate believed PW.13 and relied on his evidence. She was entitled to do so and we have no reason to interfere with her finding that PW.13 was a reliable witness. The trial Magistrate admitted a Police Statement of Mrs.L which was recorded by a Scotland Yard detective Mr. Claire Graham who gave evidence as PW.6. She clearly ruled that the admission of the statement was merely to prove that Mrs. L reported at the Malindi Police Station complaining of having been raped and robbed. She nowhere in the whole evidence referred to it except at page 98 where she explains the basis of admitting the statement. Admission of this statement was attacked by the Appellants. We have considered the issue. We are of the opinion that it was not denied by even the Appellants that the Mr. Mrs. L were robbed and Mrs.L raped and sodomised. No one denied her complaints to the Police even if the latter were to visit her in hospital to get it.

Although therefore the learned trial Magistrate does not indicate under what provisions of the law she admitted the same after rejecting to admit it under S.33 of the Evidence Act, we hold that its admission caused no prejudice to the appellants when the admission's purpose was only to prove that Mrs.L had filed a complaint of rape and robbery to the Police, a complaint which was also filed by Mr. L and other witnesses. We see no merit in this ground. The final appeal ground we wish to consider is that the trial Magistrate erred in admitting into evidence a statement taken under inquiry by PW.14 from 2nd Accused. The statement was admitted as Exhibit 17. All the four Appellants cross-examined PW.14 who produced it. None of them was critical of the statement or the contents thereof, although the statement was read in their presence.

The statement mainly restates the way the 2nd Accused led the Police from one Accused's premises to another and how they were arrested and samples of saliva and blood were collected. The main point in the statement is that the 2nd Appellant denied taking part in the robbery and rape under discussion. We do not find any fault in its admission therefore. In any case all the appellants had opportunity to cross-examine or even object to its admission if they thought it incriminated or prejudiced them. Their objection to it at

this stage, we rule, is an afterthought. We reject this ground. The upshot and summary of all that we have canvassed hereinabove is that the trial Magistrate did not err in any material way in convicting the 1st Appellant Joseph Karaita Kamau Kamaita of violently robbing Mr. and Mrs. L on the night of 24th October, 1999, at Mbuyuni House Malindi. We accordingly confirm conviction on Count One and Two of Charge, both of which are robbery with violence charges contrary to Section 296(2) of the Penal Code.

It is clear from the evidence on the record that Mr and Mrs L were attacked by a group of people numbering over 10. By virtue of S.21 of the Penal Code, the trial Magistrate was entitled to convict of the above crimes every person who had formed a common intention to prosecute the unlawful purposes which led to the offences that were committed against the unfortunate couple. This will include the crimes intended to be committed and even others that may not have been intended but ended up being so committed as a probable consequence of the prosecution of the original purpose. The Magistrate found that the 2nd, 3rd and 4th Appellants were in company of the 1st Appellant in the commission of the robbery aforementioned. He accordingly convicted them first, of the robbery counts one and two against Mr. and Mrs. L, respectively. Was she entitled to do so?

The 2nd Appellant was arrested or collected at an abandoned building in one area of Malindi after being found in circumstances that were suspicious. He apparently appeared to know who might have been involved in the alleged robbery the night before and he was willing and indeed led the police to the other Appellants. He was finally jointly charged together with 1st Appellant and other Appellants. He was not found with any of the stolen property. He was not mentioned by any of the appellants. The basis of convicting the 2nd Appellant is merely that he appeared to know so much of the people who may have taken part in the robbery. He explained this by stating that the Police wanted to know the houses occupied by people who usually break into houses or sell stolen items.

That is how he ended in showing them the houses. We have carefully examined the total evidence on the record but have failed to find a sufficient link between the 2nd appellant and the robbery, other than the possible explanation advanced by the 2nd appellant. We have no doubt that the crimes committed that night especially against Mr and Mrs L are horrifying. The photographs taken of the couple show naked bodies covered with panga and rungu injuries that will move to tears any normal person. Nevertheless, this court will not be driven by emotion but by legal principles and we on our part, found no sufficient evidence on the record upon which the trial Magistrate could have convicted the 2nd Appellant of the robbery counts one and two.

Concerning the 3rd Appellant, we note that he had dinner together with the 1st Appellant in the 4th Accused's house on 24th October, 1999 at 9.00 p.m. He left in the company of 1st Appellant. He was found sleeping by PW.13, a Police Officer, the next morning, in the house of 1st Appellant. He led PW.13 and other Police Officers to 4th Accused's house where 1st Appellant was arrested. Where had he gone after he left the 4th Accused's house the night before? The trial Magistrate found and concluded that he must have accompanied the 1st Appellant to commit the robbery aforementioned, otherwise where was he during the robberies? The 3rd Appellant in his sworn defence statement explained that he went to 1st Appellant's house at 8.30 p.m. for the 2nd time when he met 1st Appellant who allowed him to sleep in his house when 1st Appellant left to his girlfriend's house.

He hid the fact that he had had dinner with 1st Appellant in the 4th Accused before they left that house. He nevertheless stated that he did not take part in the robbery since the 1st Appellant left him sleeping in the latter's house. The trial Magistrate was entitled to hold this lie against the 3rd Appellant but in the absence of any other evidence to show that he joined the 1st Appellant, it would be unsafe to conclude that he indeed participated. The safe position was that the 3rd Appellant's explanation was reasonably possible that he slept after being left behind by 1st Appellant who stated that he was going to sleep in 4th Accused's house. He should have been given the benefit of the doubt. We accordingly do not support the trial Magistrate's conviction of the 3rd Appellant on the Counts One and Two of robbery with Violence.

As to the 4th Appellant who was the 5th Accused, the trial Magistrate's grounds for convicting him are found on page 102 of the Judgment. She states:-

"As for 5 th Accused, he was pointed out by the 1 st Accused. The Government Analys t's report does not exonerate him from the sexual offences he is charged with. Those offences were committed at the same time the robberies in Count 1 and 2 were committed by the same group of people who had attacked the couple with one common intention. The 5th Accused cannot therefore escape criminal liability for all the respective offences he is charged with."

With great respect to the Honourable Magistrate, there is nothing in the above statement that links the 4th Appellant with the robberies and the rapes committed that night. There is no evidence on the record to the effect that the 1st Appellant pointed the 5th Accused out and for what. The evidence there is, is on page 67 of the proceedings where PW.13 Pc Waithaka claims that the 2nd Appellant had pointed out the 4th Appellant at the new market in Malindi. Although the said Pc Waithaka claims that the 2nd Appellant claimed that 4th appellant was one of those involved in the robbery, and 4th Appellant was accordingly arrested, there is no evidence linking him to the crimes under discussion.

Furthermore, we believe that the trial Magistrate was putting the cart before the horse in as far as she was trying to link the 5th accused with the robberies through the rape charges. The correct position is the other way round, that the Accused must be found in recent possession of stolen items and if he fails to give a reasonable or innocent explanation as to how he came by the items, the court will presume as it has done in this case that he is the thief. And if during the theft other offences, like in this case, rape, were committed, then the court will be entitled to find that the accused or his colleagues, must have committed the rape at the same time as they were committing the theft.

Thus the conclusive finding of theft or robbery is what will lead to irresistible presumption of rape and not vice versa. The principle is well expressed in ***Andrea Obonyo –vs- R., [1962] E.A. 542 (C.A.) at pages 549 -550***. We accordingly find that the trial Magistrate erred in convicting the 4th Appellant of Robbery Counts One and Two.

We now move to consider the rape charges in Counts 3, 5, 7 and 9 against 1st Appellant, 3rd Appellant, 2nd Appellant and 4th Appellant and Unnatural Offences in Counts 4, 6, 8 and 10. We will first consider these counts in relation to 1st Appellant alone. Having confirmed the trial Magistrate's conviction on the robbery charges against Mr and Mrs L, and in view of the fact that the rape, and the unnatural offences were committed against Mrs. L during the same transaction of the said robberies, then the consequential irresistible conclusions are that the people who committed the robberies are the same or some of them that also raped and sodomised Mrs .L. The circumstances of this case including the evidence on the record point to no other reasonable conclusion. Subject therefore to the evidence proving the said charges of rape, indecent assault and unnatural offence, the evidence on the record leads to no other conclusion than that the 1st Appellant with others to be identified by evidence, raped and sodomised Mrs .L. This confirms the finding of the trial Magistrate.

Two other main issues have to be determined. These are (a) Whether there is sufficient evidence on the record to prove the latter charges and (b) Whether, the 2nd, 3rd and 4th Appellants by the same records, can be held to have participated in these crimes as found by the trial Magistrate. There is no doubt that Mrs Lighting was severally raped by two persons and sodomised by one other person that fateful night. The first rape took place in front of Mr. L who was deliberately and brutishly made to watch. The first raper lowered Mrs. L's underwear and then his own trouser and underwear and entered into Mrs L.

This is graphically described by Mr .L on page 43 of the proceedings Mr and Mrs L made a report of the rape to Robert Cronchey, PW.1, to Dr. Mustafa Ramzan Kaman who immediatelywithin a few minutes of the sexual assault attended to her at Galana Hospital at Malindi, and who took vaginal and anal swabs; and to PW.12, Robert Joseph Celini who was the first to meet her after the sexual assault and who drove her to Galana Hospital. Without more the trial Magistrate was entitled to come to the conclusion that she was raped or indecently assaulted. However, to the above evidence was added the Forensic Analysts's Report resulting from analyzing the vaginal and anal swab of Mrs Lighting which he had been requested to analyse by Malindi Police who had obtained the same from Dr. Mustafa Ramzan Kanan aforesaid.

The vaginal and rectal swabs both showed numerous spermatozoa confirming the fact that she had been

assaulted by sexually fertile men. The likelihood that these came from a sexual intercourse with her husband was very unlikely since they were attacked as they came from dinner outside the compound. It is our holding therefore that the trial Magistrate had enough evidence on the record to conclude as she did that the 1st Appellant and others not identified raped Mrs Clair Lighting on 24th October, 1999. She was also entitled to conclude from the same evidence that one person among those who attacked the couple sodomised Mrs .L. She was also entitled to find as she did that whether or not this was done by one or more of the attackers, did not matter as they all became responsible by virtue of S.21 of the Penal Code. With this conclusion we confirm the trial Magistrate's finding that the 1st Appellant raped Mrs L and committed on her the unnatural offence as charged, either personally or as an accessory.

In view of our finding hereinbefore that there was no sufficient evidence on the record to convict the 2nd, 3rd and 4th Appellants on the offence of robbery with violence on Count One and Two, we have no alternative but to find the 2nd, 3rd and 4th Appellants not guilty of all the charges preferred against them at the lower court. The final upshot then is that the 1st Appellant conviction on the charges of Robbery with Violence contrary to S.296(2) of the Penal Code on Count One and Two, and the charges of Rape contrary to S.140 of the Penal Code in Count III and Unnatural Offence contrary to S.162 of the Penal Code in Count IV, are all confirmed as his appeal thereto is hereby dismissed. The sentence of death in respect to him in respect to Count I and II is hereby confirmed.

The other sentences in respect to rape and unnatural offence are hereby suspended unless the sentence of death aforementioned is lawfully otherwise lifted or set aside. All the convictions against the 2nd, 3rd and 4th Appellants are hereby quashed and the sentences related thereto set aside. The 2nd, 3rd and 4th Appellants shall forthwith be set at liberty unless otherwise lawfully held in prison. It is so ordered.

Dated and delivered at Mombasa this 15th day of May, 2002.

D. A. ONYANCHA

J U D G E

P. M. TUTUI

COMMISSIONER OF ASSIZE