



REPUBLIC OF KENYA



**Matundura & another v Republic (Criminal Appeal E010 & E009 of 2023 (Consolidated)) [2025] KEHC 1486 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1486 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E010 & E009 OF 2023 (CONSOLIDATED)  
HI ONG'UDI, J  
FEBRUARY 13, 2025**

**BETWEEN**

**KELVIN MATUNDURA ..... 1<sup>ST</sup> APPELLANT**

**JORAM NJOROGE WAINAINA ALIAS BICOS ALIAS TIMO ... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence from the Judgment delivered on 13th February, 2023 by Hon. Khatambi (SRM) in Nakuru Chief Magistrate's Criminal Case No. 799 of 2017)*

**JUDGMENT**

1. Kelvin Matundura and Joram Njoroge Wainaina alias Bicos alias Timo referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellant respectively were charged in the Chief Magistrate's court Nakuru Criminal Case No. 799 of 2017 with the following offences:
  - i. Robbery with violence contrary to section 296(2) of the [Penal Code](#) (Both appellants).  
Alternative charge  
Handling stolen property contrary to section 322(1)(2) of the Penal code (1<sup>st</sup> appellant)
  - ii. Gangrape contrary to section 7 of the [Sexual Offences Act](#) No. 3 of 2006 (Both appellants).  
Alternative count  
Indecent act with an adult contrary to section 11(A) of the [Sexual Offences Act](#) No. 3 of 2006. (Both appellants).
  - iii. Possession of firearm without holding firearm contrary to section 4(2) (a) of the firearm certificate [Act No. 2 of 2002](#) (Both appellants).



- iv. Possession of ammunition without holding firearm certificate contrary to section 4(2)(a) of the firearm certificate [Act No. 2 of 2002](#) (Both appellants).
2. After the full hearing the appellants were convicted as follows:

1<sup>st</sup> count – Both appellants

2<sup>nd</sup> count – 2<sup>nd</sup> appellant

3<sup>rd</sup> and 4<sup>th</sup> counts – 1<sup>st</sup> appellant

On the 1<sup>st</sup> count both appellants were each sentenced to death; while the 2<sup>nd</sup> appellant was sentenced to twenty (20) years imprisonment on the 2<sup>nd</sup> count. Lastly the 1<sup>st</sup> appellant was sentenced to serve seven (7) years on each of counts 3 and 4. The trial Magistrate suspended the sentences on counts ii, iii and iv.

3. Being dissatisfied with the conviction and sentence the appellants filed these appeals on the following amended grounds:

1<sup>st</sup> appellant's

- i. That the learned Magistrate erred in law and in fact by upholding conviction and sentence of death on evidence of identification by PW1, PW2 and PW3 but failed to note that the circumstances were too difficult for positive identification and there was no advance report on this identification made to the police.
- ii. That the learned Magistrate erred in law and in fact when she convicted the appellant to death but failed to find that the alleged possession of exhibits was not proved.
- iii. That the learned Magistrate erred in law and in fact in failing to consider the new jurisprudential developments and instead awarded a sentence of death which was harsh and excessive in the circumstances.
- iv. That the learned Magistrate erred in law and in fact by failing to note that the manner in which the evidence of confession was obtained was unjustifiable.
- v. That the learned Magistrate erred in law and in fact confirming the conviction and sentence of death but failed to evaluate conclusively the defense of alibi alongside the prosecution evidence.

2<sup>nd</sup> appellant's

- i. That the learned Magistrate erred in law and in fact by upholding conviction and sentence of death on evidence of identification by PW1, PW2 and PW3 but failed to note that the circumstances were too difficult for positive identification and there was no advance report on this identification made to the police.
- ii. That the learned Magistrate erred in law and in fact when she convicted the appellant to death but failed to find that the alleged possession of exhibits was not proved.



- iii. That the learned Magistrate erred in law and in fact in failing to consider the new jurisprudential developments and instead awarded a sentence of death which was harsh and excessive in the circumstances.
  - iv. That the learned Magistrate erred in law and in fact by failing to note that the arrest of the 2<sup>nd</sup> appellant had no nexus to the instant robbery.
  - v. That the learned Magistrate erred in law and principle in awarding a sentence to run consecutively.
  - vi. That the learned Magistrate erred in law and in fact confirming the conviction and sentence of death but failed to evaluate conclusively the defence of of alibi alongside the prosecution evidence.
4. The prosecution case was founded on the evidence of thirteen (13) witnesses. The incidents complained of occurred on 14<sup>th</sup> March, 2017 and 16<sup>th</sup> March, 2017 respectively. PW3 – James Wamugunda testified that on 14<sup>th</sup> March, 2017 at 10.00pm he was at his posho mill with Macharia and Kariuki. They had just finished milling ten (10) sacks of maize for a customer. He explained that the posho mill was on his home compound. While at the posho mill three (3) men armed with an AK 47 and pistol came there and ordered them to lie down. One man had his face covered. He was ordered by the man whose face was covered to give out his dust coat which he did. The men took Ksh 3,000/= from him. They were later ordered to go to the house, where he found his wife Esther lying on the ground. He too was forced to lie on the ground.
  5. There was light on from fluorescent bulbs. The thieves demanded for Ksh 40,000/= which he did not have. He was thoroughly beaten by one of the thieves making him give out his Mpesa pin number. Unfortunately, he only had shs 1,000/= on Mpesa. He was hit on the head with a pistol and he bled. It's then he was taken to the kitchen by one attacker to wash off the blood. The kitchen lights were on and he clearly saw the face of his escort. The person had a gap between his teeth. He went back to the sitting room where he lay. While there he heard a person order for maize to be placed on his Isuzu pickup. He gave out the car keys under duress and the vehicle left. He heard his househelp being raped on the coffee table next to where he was.
  6. The robbers left at 5.00am. All their phones and other items were taken away. Him and the wife were taken to hospital by their son, Mwangi. In court he was able to identify 1<sup>st</sup> appellant whom he knew, the sewing machine, Samsung phone and phone's receipt. He also identified the 2<sup>nd</sup> appellant, as the one who took him to the kitchen to wash off the blood.
  7. PW4 who is the wife to PW3 testified that she was unwell on the material day. That night PW3 had left the house for the posho mill. Later three (3) or four (4) people entered the sitting room and ordered them to lie down, while all their phones were taken. The attackers wore marvins while one wore PW3's cap and dust coat. Suddenly PW3 and two employees were brought to the room whose lights were on. She was hit on the head and neck while PW3 was also beaten on the head and he bled.
  8. She asked for her medication and was assisted by the young man with an AK47, until she lay down on the seat. She identified the 1<sup>st</sup> appellant as the person who assisted her and she also identified the AK47. The director of the gang later left with her niece Esther and gave her a phone. Esther returned while crying as she was calmed by the young man. Elizabeth the house help informed her she had been raped. She was later treated at Nairobi Women (PMG II). It was her evidence that the girls were never raped by the 1<sup>st</sup> appellant. She did not attend any identification parade.



9. PW2 (EWG) lived with PW3 and PW4 who are her uncle and aunty. She testified that on this night she was in the house with PW3, PW4 and Elizabeth (house-help) when PW3 left for the posho mill. While in the house four men entered the house after Elizabeth opened the door. She gave a full description of the men and how they were dressed, and armed. Following the orders of the attackers she and Elizabeth lay on the floor while PW4 lay on the coach. The attackers demanded for money from PW4. The lights were on. Two men later returned with PW3 and they continued demanding for money and hit him on the head. They later demanded for the car keys and she thereafter heard the motor vehicle leave.
10. One attacker came to where she lay and took her to the bedroom. The man was not masked. He ordered her to take off her clothes, and she cried pleading with him as she was in her periods. He threatened her with the pistol. There was light. The man sat on the bed and ordered her to sit next to him. Later they left for the sitting room and she lay where she had been. The attackers moved in and out and she heard the vehicle move out of the compound.
11. The attackers smoked bhang and also took wine in the house. She later spoke to one of the attackers with whom she went to the bedroom with the intention of taking her phone and using it. The person who had earlier asked her to remove her clothes came and took her to the servant's quarters, and she saw his face very well. At the servant's quarters he raped her and took her back to the bedroom and forced her to suck his penis. He again raped her while in the bedroom. The assailants left at 5.00am. She locked the door and took her phone and called the area chief and her cousin Francis, informing them of the incident. They were taken to Star Memorial Hospital for treatment.
12. While there she received a call from an unknown number. The person told her where the vehicle was as he apologized for the ordeal. She informed the police who came to see her at the hospital. They encouraged her to continue talking to the person with a view of meeting him. The caller even sent her shs 200/= for fare. They eventually met while the CID were in hot pursuit and the person who is the 1<sup>st</sup> appellant was arrested. She was able to identify the person who raped her as (2<sup>nd</sup> appellant) and the other who she saw in the house (1<sup>st</sup> appellant). She explained how she was able to identify these two people. The 1<sup>st</sup> appellant is the one whom she had deliberately given her phone number and he is the one she was conversing with before they eventually met.
13. In cross examination she said she was able to identify the appellants because they had been together for eight (8) hours during the incident. She denied having been directed on who to pick during the identification parade.
14. PW1 Paul Mechewa lived with PW3 and PW4 as he assisted at the posho mill belonging to couple. He testified that on 14<sup>th</sup> March, 2017 he was at the posho mill with others when three people walked in with armed with a large and small pistol and they all wore marvin hats. They were ordered to lie down. His day's collection of shs 1,800/= and watch were taken away as their pockets were ransacked. He heard one of the assailants talk of Ksh100/- from PW3's old coat. Dust coats were taken and lights were switched off. However, the posho mill grills were on and he was able to see what was happening. He saw the 2<sup>nd</sup> appellant wearing PW3's dust coat. They were escorted to the main house with PW3. The lights in the house were on. They found PW4 and Elizabeth lying on a chair. There was a lot of activity in the house as he lay down. At one point the assailants poured wine and hot water on his head. After eating in the kitchen, the assailants returned and demanded for Ksh 40,000/= from PW3.
15. Later, him and Kariuki were ordered to go and remove the vehicle. When Kariuki declined both of them were thoroughly beaten and threatened with the pistol. They were then taken to the posho mill. He was threatened as they demanded he opens the mill motor, and was even shown how to cut the wires and belt. They were thereafter taken back to the house. They demanded for more money from PW3



- who told them to take the maize. They took the car keys and left one person behind. The person was young and had a gun. He later heard the vehicle leave after loading the maize, and it never came back. The room was quiet and all were lying down. He heard the young man talk to PW2. They exchanged telephone numbers. He identified the person who was talking to PW2 as the 1<sup>st</sup> appellant.
16. PW2 cut off the ropes that had been tied on their hands. On the arrest and recoveries, he gave similar evidence to that of PW2. He identified the 2<sup>nd</sup> appellant on the identification parade. He identified his bag (EXB II). He had never seen both appellants before the incident.
  17. In cross examination he repeated what he had said in his evidence in chief.
  18. PW5 Stacy Ngige stated that on 14<sup>th</sup> March, 2017 at 8.30pm they were having supper when their uncle Titus came and requested for a place to sleep. She prepared a place for him. The next morning at 5.00am she found Titus at the dining table. He did not take breakfast. Under the table, she noticed a brown bag which did not belong to her or her grandmother Josephine Ngige (the 2<sup>nd</sup> accused in the lower court case). They all left the house with uncle Titus and her daughter. Titus left for town while she went to school. Upon arrival from school in the evening she found many police vehicles and officers at home. The 1<sup>st</sup> appellant who was known to her through uncle Titus was also present. They were taken to the police station and upon their return they found the door open with the police having the big brown bag (PMG I). She identified both appellants as persons known to her.
  19. In cross examination she said she did not witness the recovery of the firearms. She confirmed having seen the brown bag in the morning under the table.
  20. PW6 No. 231845 SP Florence Kairu of DCI Headquarters is a ballistic expert. She testified that on 21<sup>st</sup> March, 2017 she received several exhibits from No. 62946 P. C. Robert Mary DCI Nakuru North. These exhibits were a machine gun, 51 rounds of ammunition, a belt unit holding 51 rounds of ammunition, a blow pistol, one magazine for a blow pistol and a bullet (A.F). She examined and tested them and found Exhibits A, D, B, 51 to be firearms and bullets under the *Firearms Act*. She produced the Ballistics report dated 23<sup>rd</sup> October, 2017 (PEXB 13).
  21. PW7 No. 84028 Cpls Peter Kalongo of Bahati police station testified that on 15<sup>th</sup> March, 2017 he was informed by the OCS to assist DCI Nakuru investigate a robbery with violence case. They went to PW3's home, and thereafter did their investigations. They recovered a sewing machine and a bag with a machine from Josephine's house. The 1<sup>st</sup> appellant was later arrested at Mchanganyiko through his communication with PW2. The 1<sup>st</sup> appellant led them to the recovery of a small pistol (PEXB 12), 15 rounds of ammunition (PEXB 13), a phone (PEXB 9) and other documents and photos. An inventory signed by all those present was produced (PEXB 15). PW2, PW3 and PW4 were issued with P3 Forms (PEXB 16, 10 and 11 respectively). He confirmed having arrested the 1<sup>st</sup> appellant, and having recovered the pistol from the trash and the 2<sup>nd</sup> machine gun in the shamba, upon being led to the ground by him.
  22. PW8 Christopher Wamugunda received a report of an attack on his parents on 15<sup>th</sup> March, 2017 at 5.00am. He rushed home and confirmed the attack and rape of his cousin and househelp. He took them to Esther Memorial Hospital for treatment. On their return home he found people plus police officers gathered there. He noticed that PW3's grey vehicle was missing. He said he had never known the appellants prior to this incident.
  23. PW9 No. 219338 SSP Joseph Belei DCIO formerly Nakuru DCIO testified that on 21<sup>st</sup> December, 2017 he recorded a voluntary confession from the 1<sup>st</sup> appellant. He produced the confession as



- (PEXB 14). The witness was Josephine Kwamboka the 1<sup>st</sup> appellant's mother. In cross examination he confirmed that the 1<sup>st</sup> appellant led them to the farm where the guns were hidden,
24. PW10 No. 235083 C. I Jazeah Mantim testified to having been requested by the investigating officer to conduct an identification parade in this matter. He prepared the parade members who had similar features. They had two witnesses (PW1 and PW2). Both identified two suspects who are the appellants (P EXB 15a & b).
  25. PW11 No. 62946 Cpl Robert Keninyi took over the investigation of this case. He arrested the appellants and another after briefs from the witnesses. The offences committed were robbery with violence, rape and being in possession of firearms without certificates. That the 1<sup>st</sup> appellant was arrested after having conversations with PW2.
  26. PW2 No. 236198 C. I. Aynet Wekebura Dale conducted an identification parade in respect of the 1<sup>st</sup> appellant on 21<sup>st</sup> March, 2017. The witness was the complainant who identified the 1<sup>st</sup> appellant (PEXB 16).
  27. PW13 Dr. Bahati Rodrick with the consent of the appellants produced P3 forms (PEXB 5, 6, 10 and 11) in respect of PW2, PW3 and PW4. The P3 forms confirmed that the witnesses had been injured while PW2 had also been raped.
  28. When placed on their defence the 1<sup>st</sup> appellant elected to give a sworn statement of defence. He stated that on 15<sup>th</sup> March, 2017 he went to his mother's house for breakfast. She is Josephine Kwamboka. He later went to his uncle's place where he took his motor bike and went to a cyber in Kiti. On the way he met four people, two of whom were familiar i.e Timo and Wachira. Timo sent him to pick a guest whom he did not know. Later a lady came and greeted him and he asked her if she was Timothy's guest and she answered in the affirmative. He asked her to board the motor bike but she told him to wait. She moved aside and begun talking on phone. Two minutes later he was arrested by DCI officers in plain clothes. He was beaten and questioned about a gun he knew nothing about.
  29. He was placed in a vehicle and directed to lead the officers to Timothy and Wachira which he did. They met Timothy and his 3 friends who were all arrested. He was taken to places and to a farm whose owner was unknown to him. He found there Timothy and Wachira. Police dug the land but nothing was recovered. He was taken back to Bahati police station. The digging continued and later a sack was recovered with a gun inside. He denied all allegations and was assaulted by the police. He never reported this to the court.
  30. The 2<sup>nd</sup> appellant gave a sworn statement of defence stated that he was arrested in Eldoret on 28<sup>th</sup> April, 2017 in respect of an Eldoret case of robbery with violence. He was brought to Nakuru Law Courts and charged with robbery with violence. That the identification parade was conducted after he had appeared 3 times before the court. He denied knowing Josephine Ngige's home.
  31. The appeal was canvassed by way of written submissions.

### **The 1<sup>st</sup> appellant's submissions**

32. In the undated submissions, the 1<sup>st</sup> appellant is basically challenging the evidence on identification by PW1, PW2 and PW3. He submits that these witnesses had been terrified during the robbery and so could not be able to identify anybody. Reference was made to the cases of: Joseph Ngumbao Nzalo v Republic [1991] 2 KAR 212, Moses Munyua Mucheru V Republic Criminal Appeal No. 228/1930, Ajode V Republic [2004] 2 KLR 81. He also challenges the manner in which the identification parade was conducted



33. On the issue of possession and recovery of exhibits he submitted that he was never found in possession of any of them. That there was no evidence that it was him who threatened people with the gun.
34. He further submitted that the death sentence meted out against him is unconstitutional. On this, reference was made to the Supreme Court cases of Dismas Wafula Kilwake v Republic [2019] eKLR; Francis Karioko Muruatetu & another v Republic [2017] eKLR.
35. He further cited Prof Ngugi J (as he then was) in the case of James Kariuki Wagana v Republic [2018] and urged the court to consider an alternative sentence. He contended that the recording of the confession by PW9 did not comply with the requirement of sections 25 and 26 of the *Evidence Act*. Lastly, he argued that he was not arrested with any item and so his defence of alibi was never offset by the prosecution.
36. In his further submissions filed on 17<sup>th</sup> December, 2024 the 1<sup>st</sup> appellant contended that the evidence does not show who arrested him and for what reason. What is there is that the police were assisted by PW2 to find a person in communication with her. He also argued that the evidence of the arresting officer (PW7) never connected him to the said phone. Further that no evidence of the recovery was produced in court. He denied having been found in possession of any phone nor any call data availed to connect him to it. He continues to argue that the case against him was not proved to the required standard.

### **The 2<sup>nd</sup> appellant's submissions**

37. The 2<sup>nd</sup> appellant's submissions are a duplication of those of the 1<sup>st</sup> appellant save for a few points I will highlight. He submitted that the trial court erred in ordering that the sentences awarded do run consecutively, since the offences were committed within the same time and ought to run concurrently. He relied on section 14 of the *Criminal Procedure Code* and the cases of: Peter Mbugua Kabui v Republic [2016] eKLR and Sawedi Mukasa s/o Abdulla Aligwaisa Mutembei v Republic [2019] eKLR.
38. He challenged his arrest and his being charged seven (7) months after the arrest of two others, and the consolidation of his file (No. 1540/2017) with another. Further that having not been found in physical possession of any item he should not have been arrested nor charged.

### **The respondent's submissions**

39. These are dated 29<sup>th</sup> October, 2024 and were filed by M/s Emma Okok Principal prosecution counsel. She gave a background to the case before the trial court. She listed five (5) issues as falling for determination. On the first issue she submitted that the complainant (PW3) gave very elaborate evidence which was supported by the evidence of PW1, PW2 and PW4. Their evidence showed that the witnesses were beaten, the attackers were armed with a knife, AK 47 rifle and a pistol. They stole from them cash, maize watch, mobile phones. They also raped PW2 and the house help.
40. It was her further submission that there was proof of injuries on PW2, PW3 and PW4 from the medical evidence and the P3 forms produced. She further submitted that PW3 identified the 2<sup>nd</sup> appellant as the person who threatened him with a pistol and that he also saw the 1<sup>st</sup> appellant at the time of arrest when some of his properties including a sewing machine and his mobile phone were recovered. Secondly PW1 identified the 1<sup>st</sup> appellant as the person who was guarding them while armed with a gun. He also identified the 2<sup>nd</sup> appellant during the identification parade. Third was PW4, the wife the PW3 who identified the 1<sup>st</sup> appellant as the one who was armed with an AK47 rifle. The evidence on identification was confirmed by PW10 Chief Inspector Jazeah Mantim who conducted the exercise. He said that



PW1 and PW2 participated in the identification parade and PW2 identified the 2<sup>nd</sup> appellant. She thus submitted that the incident occurred between 10.00pm and 5.00am and so the witnesses had sufficient time to see their attackers.

41. Referring to sections 3(1) and 10 of the *Sexual Offences Act*, counsel submitted that PW2 who was the complainant testified that she had seen the person who raped her at the servant's quarters. The person brought her back to the room where her phone was and raped again. She was taken back to the main house where she found Kariuki and PW1 were and she untied them and the robbers left. The rapist had not covered his face so she was able to see him. One of the robbers asked for her mobile number which she gave him. She immediately called for help after the attackers left and the neighbours came. While in hospital one of the robbers called her, apologizing for the ordeal and asking to meet her. She accepted to meet him and that was how the 1<sup>st</sup> appellant was arrested.
42. It was her submission that PW1's evidence on rape was confirmed by the evidence of PW13 Dr. Bahati Radrick who examined her and filled the P3 Form (EXB 6). Counsel submitted that the 2<sup>nd</sup> appellant was wrongly convicted of gang rape contrary to section 7 instead of section 10 of the *Sexual Offences Act*. She urged the court to correct the error under Section 382 of the *Criminal Procedure Code*.
43. It was counsel's submission that upon the 1<sup>st</sup> appellant's arrest, he led the police to the recovery of the small pistol (EXB 13) a machine gun (EXB 12) and 51 rounds of ammunition (EXB 4). This together with the confession (EXB 14) nailed the 1<sup>st</sup> appellant. She urged the court to uphold the conviction.
44. Counsel dismissed the appellants' defences as mere denials. Further she urged that the sentences on the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts were rightly suspended in the face of the death sentence on the 1<sup>st</sup> count. That the sentences are lawful and should not be set aside in view of the circumstances of this case.

### **Analysis and determination**

45. Having carefully considered the evidence on record, grounds of appeal, all submissions and authorities cited, I find the main issue for determination to be whether the appellants were identified as the perpetrators of the offences complained of.
46. This being a first appeal this court has the duty to re-evaluate and re-consider the evidence adduced before the trial court and come to its own conclusions. This was the holding in: *Okeno v Republic (1972) E.A 32Boru & another v Republic [2005] 1 KLR 649Kiilu & another v Republic [2005] 1 KLR 174*
47. Both appellants were charged with the offence of robbery with violence contrary to section 296(2) of the penal code which provides:

“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”.
48. The position in law is that if any one of the ingredients stated in the definition accompanies the theft/stealing an offence under section 296(2) of the penal code is complete. From the audible evidence of PW1, PW2, PW3 and PW4 who were all on the compound, and inside the house of PW3 it is very clear that PW1's family and workers were violently attacked on the material night. First of all, the persons who came to PW3's posho mill (which is on his compound) were more than one: further, they were armed with an AK47 gun, pistol and a knife. This is supported by the evidence of PW1 – PW4.



49. Secondly the attackers wounded PW3 and PW4 during the incident and P3 forms were produced by PW13 Bahati Rodick. (EXB 10 & 11) confirming their evidence. The attackers took away the items mentioned in the charge sheet including PW3's vehicle which they used to carry away the stolen items. The vehicle was later recovered by the police. I am satisfied that the offence of robbery with violence was clearly proved by the prosecution.
50. The next issue for determination is whether the appellants were identified as having been among the people who committed this offence. Before dealing with the evidence on identification I wish to deal with the out of court confession recorded by PW9 SSP Joseph Belei and produced as EXB 14. Upon perusal of the record I note that the 1<sup>st</sup> appellant did not at anytime challenge the production of the confession. He did not deny making the confession. Even in his sworn statement of defence he did not make mention of the said confession (EXB 14). The manner in which the confession was taken was in compliance with sections 25A and 26 of the *Evidence Act*. PW9 testified to this compliance which was not contested. Secondly the said EXB14 was so detailed leading to the recovery of some of the stolen items. The 1<sup>st</sup> appellant in his defence on 12<sup>th</sup> September, 2022 talked of having been beaten by the police which was an afterthought since he never raised this issue since 17<sup>th</sup> March, 2017, to the close of the prosecution case.
51. In the confession (EXB 14) the 1<sup>st</sup> appellant referred to one TIMO explaining in detail the role he played in the robbery. This confession (EXB 14) was read out by PW9 in court. The 2<sup>nd</sup> appellant in cross examination only asked PW9 if he knew him and where he was in 2017. I therefore find that the confession in EXB 14 was not repudiated and so remains unchallenged. The appeals and the submissions by both appellants do not in any way refer to this crucial evidence.
52. On the issue of identification, the 2<sup>nd</sup> appellant in his defence stated that he was exposed to the witnesses before the identification parade was conducted. Secondly that he was arrested on 28<sup>th</sup> April, 2017 while the identification parade was conducted on 10<sup>th</sup> October, 2017 after he had appeared in court thrice.
53. PW11 Cpl Robert Keninyi who was the investigating officer, said the 2<sup>nd</sup> appellant was arrested by the Flying Squad officers who handed him over to PW1. He does not indicate when the 2<sup>nd</sup> appellant was arrested. The record shows that upon arrest he was remanded at Eldoret prison. He first appeared before the Nakuru Chief Magistrate's court on 13<sup>th</sup> July, 2017 but plea was not taken. He next appeared before the court on the following dates: 28<sup>th</sup> August, 2017 when plea was taken 4<sup>th</sup> September, 2017 5<sup>th</sup> September, 2017 11<sup>th</sup> September, 2017 19<sup>th</sup> October, 2017 when an application was made for him to be remanded at Nakuru police station. No reason was given for this request, but the trial court granted an order.
54. The identification forms EXB 15(b) confirm that the identification parade was conducted on 10<sup>th</sup> October, 2017 when the 2<sup>nd</sup> appellant had been held at the Eldoret G. K. Prison, Nakuru G. K. Prison, Nakuru police station after appearing in court six (6) times. How many people had he been exposed to before his appearance on the identification parade? Is there a possibility that the two witnesses and others could have seen the appellant before his appearance at the identification parade? The answer is in the affirmative. The prosecution has not explained any steps the officers took to ensure that the appellant was not exposed. One also wonders how the 2<sup>nd</sup> appellant was charged before an identification parade was conducted, yet none of the witnesses gave his description to the police. No such evidence was adduced.
55. The 1<sup>st</sup> appellant was arrested on 16<sup>th</sup> March, 2017 and his identification parade was conducted on 21<sup>st</sup> March, 2017. He first appeared in court on 17<sup>th</sup> March, 2017 when plea was taken. He was thereafter remanded at Nakuru police station until after the identification parade was conducted. He



next appeared in court on 27<sup>th</sup> March, 2017. He was therefore not exposed to the public prior to his being paraded and he did not raise any issue on this. The only issue here is that PW2 who was the only identifying witness had participated in the arrest of the 1<sup>st</sup> appellant. So why was she again coming to identify him at an identification parade?

56. Though the identification parade form EXB 16 seems to show that several witnesses participated in this identification parade their names are not indicated and they never testified save for PW2 above. As already pointed out above the summoning of PW2 to the parade was an exercise in futility. The witnesses PW1-PW4 confirmed that they were meeting the appellants for the first time during the incident hence the need for a properly conducted identification parade which was not the case here.
57. Is there any evidence to show how the 2<sup>nd</sup> appellant was arrested? PW11 said the said appellant was handed over to him by Flying Squad Officers none of whom testified before the trial court. Even PW11 himself did not know how the 2<sup>nd</sup> appellant was arrested.
58. The incident in question lasted for eight (8) hours. There was light all over the place. It was PW2's evidence that the young man who was armed and was guarding them took her phone number and they were in communication the next day and that is how the police set a trap and had the 1<sup>st</sup> appellant arrested after meeting with PW2. Following the arrest, the 1<sup>st</sup> appellant led the police team to where the guns were buried on someone's land. Recovery of a pistol machine gun (EXB 12), 51 rounds of ammunition (EXB 14) among others was made. This would not have been recovered without the police being led by a person who was aware of their burial there. In this instance the evidence before the court is that it was the 1<sup>st</sup> appellant who led the police to the place of the recoveries. No reason was given to show why the police would lie against him on this.
59. The 1<sup>st</sup> appellant submitted so much about the electronic and digital evidence saying no data was availed from Safaricom to confirm that the simcards used were registered in his name. That would only have been an issue if the evidence ended at that. What happened after the communication and arrest is of great significance. The police found him with PW2 and he thereafter led them to the recovery of the firearms and ammunition from someone's farm and not his own shamba. How did he know that the said items had been buried in that shamba if he was not the one who put them there? This evidence plus his confession (EXB 14) which was so detailed clearly placed him at the scene of crime.
60. Coming back to the 2<sup>nd</sup> appellant, I would like to examine the 1<sup>st</sup> appellant's confession (EXB 14). The 1<sup>st</sup> appellant gave the names of persons like Samson, Wachira and Timo as the people he was with during the incident. In cross examination by the 2<sup>nd</sup> appellant this is all he said:

“I do not know who Timo is. Just read out Matundura's confession. I have never seen you. In 2017 I was in Nakuru”.

The question then is how was the name Timo attached to the 2<sup>nd</sup> appellant? Is it him who told the police he was Timo or it was someone who did so? PW5 made mention of uncle Titus. She said she did not know who Tito was. She however said her uncle Titus Ngige had visited them on 15<sup>th</sup> May, 2017 evening. The incident occurred on 14<sup>th</sup> March, 2017 and not May, 2017. The two dates do not add up. The prosecution had to avail evidence to show that indeed those alias names of “Titus” and “Tito” were the 2<sup>nd</sup> appellant's names.

61. Concerning the count of gang rape there is no evidence showing that PW2 was raped by more than one person. Secondly there is no evidence showing that PW2 gave a description of the 2<sup>nd</sup> appellant to the police. What would have assisted the prosecution on this one would have been the identification parade evidence. However, in view of this court's finding on it above it cannot be used in support of



the charge of rape against him. The 2<sup>nd</sup> appellant is narrowly escaping these charges mainly because of the manner in which the case against was investigated and handled, by the police.

62. Both appellants submitted on the harshness of the sentences meted out against them saying they were too harsh. The respondent through M/s Emma Okok counsel supported the sentence. Under section 296(2) of the *Penal Code*, the sentence provided is death and there is no alternative to it. The Supreme Court case of Muruatetu referred to only dealt with the death sentence in murder cases.
63. Following the above analysis, I find the 1<sup>st</sup> appellants appeal to lack merit and I dismiss it. I however find merit in the 2<sup>nd</sup> appellant's appeal which I hereby allow.
64. The following orders shall therefore issue:

1<sup>st</sup> appellant

- i. Convictions and sentences on 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts are upheld.
- ii. The sentences on the 3<sup>rd</sup> and 4<sup>th</sup> counts are suspended in view of the death sentence on the 1<sup>st</sup> count.

2<sup>nd</sup> appellant

- i. Convictions on 1<sup>st</sup> and 2<sup>nd</sup> counts are quashed and the sentences on the same are set aside.
- ii. The appellant to be released forthwith unless otherwise held under separate warrants

65. The 1<sup>st</sup> appellant has a right of Appeal.

66. Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

