Wangila v Republic (Criminal Appeal E006 of 2021)
[2024] KEHC 1716 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E006 OF 2021

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

EMMANUEL JAMES WANGILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence of Hon Munyekenye SPM in Webuye Senior Principal Magistrate's Court Criminal Case No. 551 of 2018 dated 3rd February, 2023)

JUDGMENT

1. The Appellant herein Emmanuel James Wangila was tried and convicted of the first count namely robbery with violence contrary to section 296(2) of the Penal Code and a second count of rape contrary to section 3 (1) as read together with section 3(1)(c) of the *Sexual Offences Act*.

2. Under Count I, the particulars of the offence were that on 20th day of June 2018 at Bilibili village Mukuyuni Sub-location in Bungoma North Sub-County within Bungoma County jointly with others not before the Court while armed with dangerous weapons namely AK47 riffle and a hammer robbed ANW of Kshs. 8,600/=; two mobile phones make Techno and a Maasai Shuka all valued at Kshs. 12, 600/= and immediately prior to or after the time of such robbery killed Michael Wanyonyi.

3. Under Count III, the particulars of the offence were that on 20th day of June 2018 at Bilibili village Mukuyuni Sub-location in Bungoma North Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the anus of ANW without her consent.

4. Having been taken through full trial, he was convicted respectively under both counts and sentenced to serve life imprisonment under both counts. The sentences were ordered to run concurrently.

5. Being aggrieved by the convictions and sentences, the Appellant lodged this appeal preferring the following grounds of appeal:

a. That the trial magistrate erred in both law and fact in convicting the Appellant on contradictory, inconsistent and uncorroborated pieces of evidence.

b. That the trial magistrate did not consider the first report of the complainant.

c. That the trial magistrate did not find that the complainant did not identify any of the culprits who had attacked her.

d. That the investigating officer did not avail the O.B regarding the alleged incident.

e. That the parade which was conducted on 21.6.2018 did not implicate the Appellant as he was arrested on 23.6.2018 long after the said parade.

6. The case, as presented by the Prosecution was that PW1, ANW, the Complainant in Count I and II testified that on the night of 20th June 2018 at precisely 1.20 am she heard people knocking on her door and who identified themselves as police officers from Mukuyuni. She quickly woke up her husband, who sat up on the bed and demanded to know the persons who were knocking. They identified themselves as police from Mukuyuni. Her husband proceeded to the living room, switched on the security light and the house light and proceeded to inquire which door should he open, and they directed him to open the front door. Her husband opened the door that exited to the kitchen and that two-armed men entered their house, one armed with a hammer and the other one with a gun. As they gained access to their house they told her husband that his stubbornness would end on that day and on realizing they were not police officers, she ran into their bedroom. The one with a gun remained stationed at the door while the one with a hammer entered the house. As she ran into the bedroom, the one with a hammer pursued her catching her and directing her back to the living room. Her husband who also had tried to flee unfortunately fell down. The one with a gun ordered her husband to lie down as the one with a hammer asked her to give them all the money they had realized from the sale of a cow. She told him she is not aware that her husband sold any cow but she had money that she had realized from her alcohol sales. Her husband directed her to give them the money and she went and brought the Kshs. 8,600/=, and gave it to them. As the one with the gun still stood at the door, the one with a hammer told her to come back to the living room and watch them kill her husband. She stood in front of him and watched the one with a gun shoot her husband two times and the third shot missing him and hitting the door. After that, the one with the hammer took her into the bedroom and the one with the gun entered her children bedroom and took out her daughter. After entering her bedroom, the one with the hammer told her to climb onto the bed and undress. She told him that she was sick and could not undress but he insisted. He told her to bend down and hold the bed and on her refusal he threatened to cut her with an axe, the one that was at the corner in her room. She bent over after he had cut her thumb as she held her hands up begging him not to kill her. He proceeded to rape her from behind. After the rape ordeal, she sat on the bed while the man with a hammer took the big bag that was nearby, poured out the coins that were in there, took them and pocketed them. She testified that she did not count the coins and did not know how much it was. She noted that she saw the man clearly as he bent to pick up the bag with the coins as the light in the bedroom was on. She testified that the man also took her mobile phone make Itel and her husband's phone Techno worth Kshs. 4,000/=. Also, he took a Masai Shuka that was in the bedroom and covered his head with it and left while locking the door behind him. She stated that she called out to her son to come open the door but it was her daughter who opened the same. She left the bedroom and headed to the living room where she saw her husband's body lying on the table. She stated that the two-armed men put the body of her husband on the table and left. She testified that with her daughter they waited for about 30 minutes before they left the house and ran to the house of the landlord where they knocked on the door but she did not open. They rushed to the house of the landlord's son where they knocked and

he opened and they sought his help as her husband had been killed. She ran towards the house of the community policing officer screaming and she told him what had happened. The community policing officer quickly called the village elder who proceeded to her house with the police that night at around 3.00am. She testified that while at the scene with the police they picked two spent cartridges inside her house and one outside the next day. At day break, she proceeded to Mukuyuni police station where she reported the incident and recorded her statement. She was referred to Naitiri Sub-County Hospital for treatment where she was treated. She testified that the next day she was summoned to Mukuyuni Police Station where she was to identify the people who robbed, raped her, and killed her husband. She went there and an identification parade was conducted and she was able to identify the culprit who had the hammer at the time of the robbery and raped her. She testified that the person who raped her had a mark on his neck which appeared like an injury that had not healed well.

On cross-examination, she stated that it was her late husband who opened the door and that the armed robbers gained access to their home wearing raincoats which had hoods. She further testified that it was the Appellant who raped her and that he was before the dock in the court. She stated that during the identification parade conducted either on 21st August 2018 or 22nd August 2018, she was able to identify the Appellant herein. She reiterated that the person who raped her had a mark on his neck and that the Appellant showed his neck and she was able to identify the mark she spoke of as that which was on the Appellant the day he raped and robbed her.

On re-examination, she stated that she could not remember the exact date she attended the identification parade but it was soon after the ordeal.

7. PW2 was NS, who testified that she was 17 years old at the time of the incident. She recalled on 20th June 2018 at around 1am while her father was sleeping she heard footsteps approach the house then a she heard a knock on the door and a voice from outside instructing them to open up as they were police officers from Mukuyuni Police Station. She testified that she heard PW1 talking to her father who proceeded to open the door that exited to the kitchen. She testified that she was at the window peeping and saw two people enter their house, one with a gun and another with a hammer. Further, she heard one of them telling her father that his stubbornness would end on that day as the other one told PW1 to witness the death of her husband. She later heard three-gun shots. She stated that she saw one person take PW1 into the bedroom while the other entered her bedroom and took her outside. The other man with a gun told her that he would rape her but she struggled with him and in the process the one who led PW1 to her bedroom came out and told the other man that they should leave but prior to that they lifted her father and placed him on the table. She did not know that he was dead.

On cross-examination, she stated that when the armed robbers gained access of their house, they did not have any masks on and that the one who was with the Appellant was the one who took her out of her room.

8. PW3 was David Nyongesa Konyero, who testified that on the night of 20th June 2018 at 2.00am he recalled that he received a call from his chief enquiring about what happened in his area. The chief informed him that he did not know anything and that he only had information that one Wanyonyi had been killed. He proceeded to ask him to confirm the same and when he called the community policing officer he confirmed the same and he proceeded to revert to the chief. The police came and took them to the scene where they found that Wanyonyi had been killed. They took his body to the mortuary and that the next day he recorded his statement.

On cross-examination, he stated that he went to the scene and that he did not know who had killed Wanyonyi as he was not told anything about the incident.

9. PW4 was John Nalianya Kisembe, who testified that the deceased herein was his nephew and that on 20th June 2018 at night he received a call from PW1 informing him that Wanyonyi had been killed. He proceeded to her home and found the police there and that the body of the deceased had already been taken away. He was later called to Kiminini Hospital where he attended the post mortem examination. He saw that the deceased was shot in the chest and that the bullet went through and that he was also hit on the hand. He confirmed that the deceased was Michael Wanyonyi as he knew him quite well.

10. On cross-examination, he testified that he went to the scene that night and that he was told it was the Appellant who had robbed and killed the deceased but that he did not find the Appellant at the scene.

11. PW5 was Dr. Patrick Musitsa who testified that he worked at Kitale County Hospital and that he was in Court to produce the post mortem report for one Michael Wanyonyi which was performed on 28th June 2018 at Kiminini Cottage Hospital. He testified that the body had lost a lot of blood and that there were two gunshot wounds, one on the left hand that entered from outside of the head exiting from the inside of the hand. He noted that it had broken the bone and tore the blood vessels. According to him, the second gunshot had entered the right-side chest and had fractured the second rib and it exited through the stomach on the left. The intestines were out. Further, he noted that inside the body the post mortem established that the gunshot ruptured the four chambers of the heart and the diaphragm had raptured, the small intestines had raptured and poured feaces in the stomach. He stated that no bullets were recovered and that the caused of death was rapture of the heart. He produced the postmortem report dated 28th June 2018 as PEXH 2.

    On cross-examination, he stated that he was not informed of who exactly fired the gunshots that killed the deceased.

12. PW6 was No. 235124 CI Alfred Mbalani Kayi, who testified that he is based at DCI headquarters Ballistic Section Nairobi. He stated that he was before court to produce a report authored by Lawrence Nthiwa who was no longer with the Ballistic Department as he exited left the department. According to him, on 5th July 2018 they received some exhibits from No. 63962 PC John Saina and which comprised of cartridges that had ben expelled and he had them marked as B1, B2, B3 and B4. PC Saina was interested in the expert information concerning: whether the cartridges namely B1, B2, B3 and B4 were fired from the same gun; to confirm which gun fired the same; and to confirm whether the gun that fired the same had been used in any other crime reported. After examination, he established that the cartridges B1, B2, B3 and B4 were cartridge cases for calibre 7.6 ×39 mm. Further, it also reveled that under comparative microscopic examination of the cartridges in conjunction with each other as well as others of equivalent calibre including test cartridges fired from the exhibit AK 47 rifles No. UG-09441999 marked as Exhibit A and submitted by DCI Kimilili vide their CR. 924/186/2018 revealed sufficient marching breech face and ejector markings to enable him opine that Exhibits marked B1, B2, B3 and B4 were fired from the same Exhibit AK 47. He stated that the rifle was used in other shooting incidents as enumerated in his report. He added that Mr. Nthiwa did the report and addressed the same to DCI Bungoma North dated 23rd August 2018. He proceeded to produce the report and the exhibit memo form as PEXH.4 and PEXH.5 respectively.

    On cross-examination, he stated that the cartridge cases do not identify the person who committed the crime and that he was not aware of the person who fired the gun.

    On re-examination, he stated that the cartridge cases that were before the trial Court were the ones that were brought and had been used in the commission of the said crime.

13. PW7 was Redemta Murunga, who testified that she works as a clinical officer at Naitiri County Hospital. According to her, she filled PW1's P3 form on 20th June 2018. She testified that PW1 came

to the facility with a claim that she had been sexually assaulted by a person she did not know. On examination of her private parts, she observed that PW1's vagina was hyperemic and had a whitish discharge from her vagina. On further examination from the high vaginal swab, spermatozoa were present showing that she had engaged in sex. She stated that PW1 had claimed that she was raped. She produced PW1's P3 form dated 20th June 2018 as PEXH 1.

On cross-examination, she stated the complainant claimed that she did not know the assailant.

14. PW8 was No. 63962 PC John Saina who testified that he is now attached at Navakholo Police Station but was previously based at DCI Bungoma North. He stated that he was the investigating officer in this matter. He recalled on 20th June 2018 while at Mukuyuni Police Station when he was informed that there were gunshots fired at Bilibili village. The information was from the village elder through phone call. He stated that gunshots were heard in the home of one Michael Wanyonyi. At 1.30 am, in the company of other officers they left the Police Station and proceeded to the scene where they found Michael Wanyonyi dead on the table with his wife, children and neighbours present at the scene. They took charge of the scene, conducted a search of the area and recovered bullet shells that had been discharged from an AK 47 rifle. The proceeded to record statements and took the body of the deceased to the mortuary. He stated that the statement of the deceased's wife detailed what occurred on that fateful night.

On cross-examination, he stated that he was the investigating officer and that he recorded the statement of PW1 at the scene and later PW1 came to the station to officially make a report and give her statement.

15. PW9 was No. 2337074 CI Mohamed Turbo Ibrahim, who testified that he is stationed at Itumbe Police Station but at the time of the incident he was based at Mukuyuni Police Station. He testified that he was the one who conducted an identification parade with regard to the case on 24th June 2018 as per the identification form. He stated that the identification parade was conducted on the Appellant and that he consented to the same. He stated that he assembled nine people including the Appellant herein and who were directed to stand in line with the Appellant who was given the chance to choose where he wished to stand. According to him, the Appellant stood at one end and after he positioned himself, PW1 was called and told to walk through the parade and identify the person who had robbed her on 20th June 2018. He stated that after walking through the parade, PW1 identified the Appellant herein by touching him. After the parade, the Appellant signed on the identification parade form indicating that he was satisfied with the way it was conducted. He produced the identification parade form as PEXH 3.

On cross-examination, he stated that he did not use PW1's report or statement to conduct the identification parade and that it is the investigation officer who determines whether there should be an identification parade or not. He further stated that PW1 did not mention to him that the suspect had a scar like the one he had.

16. Upon being put on his defence, the Appellant tendered a sworn statement where he averred that he did not commit any crime. He testified that on 22nd June 2018, he sold fire wood to one Jacinta Isuchi and who did not agree on the payment. He testified that at that precise moment there were police officers from Mukuyuni Police Station passing on a motor cycle and since a crowd had gathered around him and the woman, the police officers enquired as to what the problem was and that the woman informed them that the Appellant had gone to her home asking for money. He testified that one of the police officers was a friend of the lady and so they warned him against asking for his money. He stated that he left the place and that the next day while working on a fence for the area MCA, the lady had him arrested and taken to the Police Station. He was notified that Jacinta was the complainant and that the complaint was that he had threatened someone. He stated that a case was filed at Kimilili Court

where he denied charges. He added that the complainant herein did not brief the investigating officer of any facial mark despite PW1 noting that she identified him vide that mark. He stated that PW1 only aims to frustrate him as per the evidence of the doctor that indicated that she did not know the person who had raped her.

On cross-examination, he stated that the he never saw any gun and that the ballistic report did not link him to any gun. He insisted that at the night of the incident he was at home sleeping and that he lives with his parents.

17. The appeal was canvassed by way of written submissions. Only the Respondent filed its written submissions.

18. This being the first appellate court, it has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate Court must give allowance for the same. This was well put in the well-known case of Okeno V. Republic [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Offence of robbery with violence.

19. What constitutes the offence of robbery with violence was well captured in the case of Olouch vs Republic (1985) KLR where the Court of Appeal stated as follows: -

> " ...Robbery with violence is committed in any of the following circumstances:

i. The offender is armed with any dangerous and offensive weapon or instrument; or

ii. The offender is in company with one or more person or persons; or

iii. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

20. In the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007, it was stated that:

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

21. According to the evidence adduced, PW1 was with her family at home sleeping when accosted by the Appellant and another person not before the court. She testified that the two men had a gun and a hammer, with the Appellant herein being the person who carried the hammer. They ordered her and her husband to give them the money they had realized from the sale of a cow and proceeded to take her money in the sum of Kshs. 8,600/=, some coins whose value was not ascertained and two phones make Itel and Techno. In the course of the act, there was the use of violence as her husband was killed.

22. From the foregoing, it is clear that the ingredients of the offence were rightfully proven as the offender was armed with dangerous and offensive weapon which in this case was a hammer; the offender was in the company of one or more persons, and violence and threats were occasioned. The Appellant's companion was armed with an AK 47 assault rifle.

23. The question of identification of the Appellant may be answered with reference to the identification parade that was conducted. It was the evidence of PW1 that after her husband was shot, the Appellant led her into her bedroom where he instructed her to undress and bend down. PW1 testified that the bedroom had light from D-light lamp and a florescent bulb was on with electricity. She stated that the person who had the hammer raped her and during the ordeal his hood fell off his head and that he did not place it back. After the ordeal, PW1 sat on the bed looking at him as he bent down to pick up a bag that had some coins, stand up, pour the coins from the bag and put them into his pocket. PW1 stated that at that moment she was able to see him clearly and she noticed that his neck bore a scar that looked like it was from an injury that failed to heal well. Also, as PW1 made a report of the incident she was categorical that she would be able to identify the perpetrator who robbed her. On 24th June 2018, PW1 attended an identification parade which was conducted by an officer of the rank of a Chief Inspector, PW9. PW9 testified that the parade was conducted during the day and it comprised of nine people including the Appellant herein. The Appellant was allowed to choose where he wished to stand in the parade and that PW1 was asked to walk through the identification parade wherein she touched the Appellant as the person who had robbed and raped her. The identification parade form was produced as PEXH3 and on the said form the Appellant herein attested to the fact that the identification parade was conducted in a manner that satisfied him. Identification parades are meant to test the correctness of a witness's identification of a suspect. This position was appreciated in Njihia v Republic {1986} KLR 422 which held: -

> "...If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

24. The Appellant faulted the identification parade on several fronts. He argued that PW1 did not state that she could identify her attackers by seeing them at the time of recording their statements, or prior to the parades. This argument is attractive. But it collapses on the ground that other than the identification parade, there is also evidence of recognition, which is, where a witness states she could recognize a previously seen person. A common thread running across the prosecution evidence is that the witnesses spent more time with the Appellant as he raped her and took his time to ransack the bag that was on the floor as he took the coins that fell out of it. PW1 testified that at that moment he was looking for the coins, collecting them and placing them inside his pocket his hood was not covering his face and that she was able to see him clearly as the room was well lit. The law is settled that where the only evidence against an accused is that of identification/recognition the court must scrutinize that

evidence with great care and be satisfied that there was no possibility of error. In Wamunga v Republic [1989] KLR 426, the Court of Appeal stated:

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

25. In addition, in R v Turnbull & Others (1976) 3 ALL ER 549, where the court laid down the factors that ought to be considered when the only evidence turns on identification by a single witness, thus:

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

26. During the rape ordeal, PW1 spent ample time with the Appellant. The lights were on. The Appellant's face was this time not covered with the raincoat's hood. The Appellant was identified as the one who robbed and raped PW1 as she was able to recognize the wound on his neck.

27. PW9 testified that he was the one who conducted the identification parade and assembled members of the parade, informed the Appellant of his rights including having a witness present but he opted not to have one. The Appellant signed the parade form before PW9 called PW1 to the parade. The Appellant chose the position in the parade and was satisfied after the complainant picked him by signing the form again. He did not raise any objection to the manner the parade was conducted. I have perused the parade form and i am satisfied that the parade was properly conducted.

28. The Appellant's defence was a simple denial of the charges with allegations that he is targeted and frustrated based on the scar he bears and due to a grudge by PW1 over an unpaid debt. The Appellant did not raise this issue before or during the parade. This was therefore an afterthought. The defence was thus properly rejected by the trial court.

Offence of Rape

29. On offence of rape, the medical evidence of PW7 showed that PW1 was penetrated as "high vaginal swab established the presence of spermatozoa and that she also had whitish discharge which indicated that she had been raped.." No consent could have been given in view of the injuries occasioned on PW1, and consent as a defence was not raised. PW7 produced PW1's P3 form marked as PEXH1.

30. The medical evidence proving penetration of PW1 without consent (lack of which is an ingredient in the offence of rape under the *Sexual Offences Act*) having regard to the use of force and injuries occasioned on PW1 as established by medical evidence.

31. For the reasons set out above, this Court finds that the Respondent proved its case against the Appellant on the offence of rape contrary to section 3 of *Sexual Offences Act*, having established the necessary ingredients for the offence to the required standard of proof of beyond reasonable doubt.

32. On the ground of the trial court convicting him based on contradictory and inconsistent evidence, it is a known fact that in any criminal trial where several witnesses testify, there are bound to be contradictions or some inconsistencies. Such inconsistencies and or contradictions may be ignored if they do not go to the root of the prosecution case, otherwise they should be resolved in favour of the accused.

33. In Richard Munene v Republic [2018] eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

34. In Dickson Elia Nsamba Shapwata & Another v The Republic, (Criminal. Appeal. No. 92 of 2007), the Court of Appeal of Tanzania addressed the same issue of discrepancies and stated;

> ''In evaluating discrepancies, contradictions and omissions, it is undesirable for a Court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.''

35. Similarly, in Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal cited Twahangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

36. I have gone through the record of the trial court and reanalyzed the evidence. I am unable to find significant contradictions that would necessitate this court to overturn the trial court's decision on this ground. The witnesses recounted what happened and what they knew and therefore, they were consistent in their testimonies before the trial court.

Sentence

37. The punishment for robbery with violence is provided for in section 296(2) of the Penal Code that provides that in case of a conviction the offender shall be sentenced to death. However, as regards the sentence, the Supreme Court decision in Francis Karioko Muruatetu & Anor. v. R, [2017] eKLR found that the mandatory nature of death sentence in section 204 of the Penal Code is inconsistent

with *the Constitution*: and held that the court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. In my understanding, the death penalty is still prescribed in law and it can be meted in appropriate cases where the circumstances warrant it.

38. The trial court in this matter sentenced the Appellant to serve life imprisonment for this offence bearing in mind the victim impact report, the Appellant's mitigation and the fact that the Appellant is a first offender. In the case, all the ingredients of robbery with violence have been met. The Appellant, who was in the company of another, robbed the Complainant, and in the course of the robbery, the Appellant not only used force, but was armed with a dangerous weapon with which he used to threaten the complainant and in the course of the robbery he assaulted and raped the Complainant. The degree of injury was assessed as harm. It is also essential to note that in the course of the robbery the complainant's husband was killed. Hence, the circumstances were rather tragic for both the complainant and her husband as the same traumatized their children.

39. The level of violence unleashed on the complainant and her husband is sufficiently serious to warrant long term imprisonment. Accordingly, I find no reason to interfere with the sentence meted upon the Appellant by the trial court on count one.

40. Section 3 (3) of the *Sexual Offences Act* states as follows;

> " A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."
>
> The trial court sentenced the Appellant to serve life imprisonment.

41. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

42. In the case of Wanjema vs. Republic (1971) E.A. 493 the court stated as follows; "An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

43. The complainant was dehumanized by the Appellant who sexually assaulted her under threat of violence and after he had cut her finger with an axe which he picked from the complainant's room. To add salt into injury, the Appellant robbed her of several items and money. All these were going on while the Appellant's companion was busy shooting the complainant's husband. The sentence imposed by the trial court was commensurate with the Appellant's blameworthiness. The Appellant and his companion terrorized the complainant and her husband during the incident and that their family's life has been turned upside down and traumatized for life. The Appellant's conduct was abhorrent which merits a custodial rehabilitation. Accordingly, i find no reason to interfere with the sentence meted upon the Appellant by the trial court.

44. Having considered the appeal and reevaluated and reanalyzed the evidence, I find no merit in this appeal and i dismiss it. I uphold both conviction and sentence of the trial court.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Emmanuel James Wangila for Appellant

Miss Kibet for Respondent

Kizito Court Assistant