Nduta & another v Republic (Criminal Appeal 6 of 2020)
[2024] KEHC 2376 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2376 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL APPEAL 6 OF 2020

CM KARIUKI, J

MARCH 7, 2024

BETWEEN

SAMUEL NJUNG'E BEN NDUTA ..... 1ST APPELLANT

IBRAHIM WAHOME NDERITU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. C. Obulutsa (CM) in Nyahururu CMCR No. 2108 of 2018 on 22nd May 2020))

JUDGMENT

1. Samuel Njung'e Ben Nduta and Ibrahim Wahome Nderitu, the appellants herein were charged before Nyahururu Chief Magistrates' Criminal Court with 6 counts as follows: -

2. Count I: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code

3. Particulars being that on the 10th day of August 2018 at Subukia Trading Centre in Muruai Location within Nyandarua County jointly with others not before the court robbed Freciah Wairimu Rono of one keg pump, one gas cylinder, and cash Kshs. 18,200 all valued at Kshs. 57,700/-

4. Count II: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code

5. Particulars being that on the 23rd day of August 2018 at Uruku Sub Location in Kianjogu Location within Nyandarua County jointly with others not before the court robbed Susan Wachira Karuri of cash Kshs. 2000 and immediately before and immediately after the said robbery beat the said Susan Wachira Karuri.

6. Count III: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code

7. Particulars being that on the 23rd day of August 2018 at Uruku Sub Location in Kianjogu Location within Nyandarua County with others not before the court robbed Nancy Wamaitha Mwangi of a mobile phone make Itel IK2160 valued at Kshs. 850/- and immediately before and immediately after the time of such robbery beat the said Nancy Wamaitha Mwangi.

8. Alternative Count III: Handling Stolen Goods contrary to Section 322 (1) of the Penal Code

9. Particulars being that on the 23rd day of August at Mairo inya within Nyandarua Country, otherwise in the course of stealing dishonestly received or retained a mobile phone make Itel IT1260 valued at Kshs. 850/- knowing or having reasons to believe it to be a stolen good.

10. Count IV: Gang Rape Contrary To Section 10 of the *Sexual Offences Act* No. 3 of 2006

    Particulars being that on the 23rd day of August 2018 at Uruku Sublocation within Kianjogu Location in Nyandarua County in association with Ibrahim Wahome Ndiritu and others not before the court intentionally and unlawfully caused his penis to penetrate the vagina of Susan Wachira Karuri without her consent.

11. Alternative to Count IV: Committing an Indecent Act with an Adult contrary to Section 11 (a) of the *Sexual Offences Act* No. 3 of 2006

12. Particulars being that on the 23rd day of August 2018 at Uruku Sublocation within Kianjogu Location in Nyandarua County intentionally touched the buttocks, breasts, anus, and vagina of Susan Wachira Karuri with his penis against her will.

13. Count V: Gang Rape Contrary To Section 10 of the *Sexual Offences Act* No. 3 of 2006 and the alternative of committing an Indecent Act with an Adult contrary to Section 11 (a) of the *Sexual Offences Act* No. 3 of 2006 relates to Ibrahim Wahome.

14. Count VI: Breaking into a Building and Committing a Felony contrary to Section 306 (a) of the Penal Code.

15. Particulars being that on the 22nd day of August 2018 at Ngamini Trading Centre in Kahuthia Location within Nyandarua County jointly with others not before the court broke into a building namely Thayu Bar and committed therein felony and stole five Kenya Cane alcoholic drinks, sportsman cigarettes, safari cigarettes, two bottles of soda, a 4 GB flash disk and Kshs. 2000/- all valued at Kshs. 6000/-

16. The prosecution called 7 witnesses and upon conclusion of its case, the appellants were placed on their defense. They gave sworn testimony on 16/9/2019. Consequently, the court convicted the appellants on all counts except Count 1 whereby only the 1st appellant was convicted and the 2nd appellant was acquitted. The trial court proceeded to sentence him as follows:In Count 1 – 30 years imprisonment for the 1st appellant.Count 2 and count 3 – 30 years imprisonmentIn Count 4 and 5 – 20 years imprisonmentIn Count 6 – 3 years imprisonment

17. The sentences were to run concurrently.

18. Being dissatisfied with the whole of the said judgment, the 1st appellant filed the instant appeal vide the petition filed on 5th June 2020. Some of the grounds of appeal he seeks to rely on include the: -

    i. The trial magistrate erred in law and facts by not considering that the identification parade was not carried out in accordance with the law.

    ii. That the trial magistrate erred in law and facts for relying on circumstances evidence on the whole proceeding of this case without relevant facts regarding this case.

    iii. That the trial magistrate erred in law and facts by not considering that there was no forensic evidence adduced in court to LMR the appellant with the commission of the offense. that the appellant was not found with anything from the primary or secondary scene to link him with a commission of this offense.

    iv. The trial magistrate erred in law and fact by relying on uncollaborated evidence and by not evaluating the evidence of PW1 who clearly stated the circumstance of the attack was abrupt and it was at night. She did not know the attackers and it would have not been possible identification and that would not have rendered her to conviction.

    v. The trial magistrate erred in law and fact by relying heavily on single evidence, admitting evidence that was procured during the trial, abandoning the appellant's defense, and violating his fundamental right.

    vi. That the appellant prays that this appeal be allowed and sentence be set aside and therefore he be set at liberty.

19. The 2nd appellant filed his supplementary grounds received on 9th June 2023 averring as follows: -

    i. There was no identification parade done at the police station for the complainant to be able to identify the accused person which is unprocedural.

    ii. That the learned magistrate erred in law and facts by just convicting the accused on confession of PW1 without any other tangible evidence.

    iii. That the learned magistrate erred in law and facts by noting that the 2nd accused has a clear visible cut on his face contrary to what PW5 said before the court that she saw the accused person clearly and has no mark on his face.

    iv. That the doctor examined one of the raped victims and found semen oozing and they should have used DNA to ascertain the real perpetrators to avoid implicating innocent persons.

    v. Nothing was found at his disposal that could prove right the words of the 1st accused that led to his arrest and that he sis not know him.

    vi. That he was convicted of offenses that were alleged to have happened about 70 kilometers apart in Uruku and Ngomongo which are far apart and it is not practical for the same to happen taking in mind that their prosecution asserted that there was no motor vehicle nor motorcycle used by the perpetrators during their operation.

1st Appellant's Submissions

20. The appellant submitted that he gave sworn evidence and the prosecution did not cross-examine him and in essence, it implied that the prosecution believed the evidence and the same stands unchallenged.

21. It was asserted that there was an irregularity in the proceedings that occurred at the time of plea taking of the consolidated charge sheet which rendered the whole trial illegal. They stated that the charges were read collectively and not separately as they should have been which was irregular. The prejudice suffered is that the proceedings indicate that only five charges were read out to the accused persons. The consolidated charge sheet contains a total of 8 charges and the prosecution did not at any given time apply to withdraw some of the charges to leave 5 charges.

22. The appellant stated that in the judgment delivered on an unknown date as it is not dated, the appellant was convicted of 6 counts and the appellant was equally sentenced on 6 counts on 22/5/2020. They also averred that the court did not address itself on the 8 counts in the consolidated charge sheet in its judgment. The appellant was convicted on charges that he was not asked to plead to on 4/6/2019 where 5 charges were read out to him. The charge sheet, proceedings, and judgments are not in tandem and they raise a lot of confusion on which count the appellant was found guilty of.

23. It was elaborated that the appellant was found guilty in Count V i.e. the gang rape of Susan Wachira in respect of both accused but the said count related to one Ibrahim Wahome Ndiritu and not to the appellant. From the judgment, both accused persons were found guilty of Count VI which is stated in the judgment as breaking into a building called that but the charge sheet on page 18 of the record of appeal indicated Count VI as the offense of gang rape on Nancy Wamaitha against the appellant only. Reliance was placed on Alio Ali Suga v R [2009] eKLR, Davis Wanyama v R [2009] eKLR

24. The appellant asserted that there was a further irregularity noted on counts I-III where the appellant was charged with the offenses of robbery with violence. That the charges were fatally defective for duplicity a position confirmed by the Court of Appeal in the case of Joseph Njuguna Mwaura & 2 othersvs. R [2013] eKLR. Further reliance was placed on Kepha Omaru Nyabuto v R [2017] eKLR and Joseph Musyoki Mutua v R [2017] eKLR

25. It was averred that the particulars of counts 1, 2, and 3 did not disclose an offense of robbery with violence as the particulars did not indicate that the accused were armed with a dangerous or offensive weapon or instruments that they used violence on the victim and that the victim sustained injuries.

26. They also castigated doubts on the identification as the crimes occurred at night making the conditions for identification difficult and the fact that the investigating officer did not conduct an identification parade in the matter and he allowed the complainants to see and interact with the appellant when he was under arrest while at Mairo Inya Police Station. It was stated that although it was alleged that the appellant was found in possession of a stolen phone, the alternative charge of handling stolen goods was not read out to him when he took a plea on 4/6/2019.

27. The appellant submitted that the complainants were scared when the offense was said to have been committed and the prosecution did not produce the first report by the complainants to prove that they were indeed able to identify their assailants and that they gave the description of the assailants to the police while reporting the offenses. They also asserted that some key witnesses were not called to testify. It was asserted that the investigating officer did not prepare an inventory of the recovered phone and slip from KCB to confirm that it was recovered from the appellant who denied the offense and that the evidence said to have connected the appellant to the offense was shaky and inconclusive.

28. Reliance was placed on Wycliffe Shakwila Mungo v Republic [2018] eKLR

29. Furthermore, it was contended that the evidence by the complainants did not support the charges. That none of the complainants related to the charges testified having been raped by the accused persons jointly or in the presence of each other. That each of the complainants to the charges gave a narrative of how she was raped but one assailant and they did not testify that both accused persons raped them.

30. On sentence, the appellant asserted that he was sentenced on defective charges, that were not read to him, and on counts that did not correspond to the charges in the charge sheet, they urged the court to set aside the sentences and find that the case is not fit for a retrial.

Respondent's Submissions

31. The respondent relied on Section 295 of the Penal Code and Johanna Ndung'u vs Republic Criminal Appeal No. 116 of 1995 on the ingredients needed to be proved to sustain the conviction on the charge of robbery with violence. On the fact that the offender must be armed with a dangerous offensive weapon, it was submitted that the accused was convicted of 2 counts of robbery with violence in Counts I and II respectively as against Susan Wachira and Nancy Wamaitha.

32. They stated that in Count 1, PW1 testified that while sleeping on 22.8.2018 at 11.00 pm her door was broken and she saw two people with metals and sticks, she saw a total of four men among them the accused persons. In Count II, PW2 testified that while asleep on 23.08.2018 at around midnight in the company of a workmate, some people hit the door with a metal bar and the door came off. Upon entering the house, the suspects hit them with clubs and demanded money. One suspect struck her with a rungu. She was able to identify the appellant who threatened to thrust a bottle into her vagina.

33. With respect to Count III, PW3 the complainant indicated that on 20-23 August 2018 while asleep at around 10.00 pm, a total of four thugs attacked them. They hit the door with metals. The respondent thus avers that the fact that the offenders were armed with clubs and metals and sticks, then this ambit has been proved for the said weapons are dangerous in the circumstances.

34. On if he was in the company of more than one person, the respondent asserted that all the prosecution witnesses indicated in their testimony in court that on a fateful night, they saw a total number of 4 persons among them the appellant as the people who had attacked and robbed them and later gang-raped the complainants.

35. On if at or immediately after the time of the robbery, the accused(s) wounds, beats, or uses violence to any person; the respondent pointed out that PW2 testified that one suspect struck her with a rungu and PW3 testified that the accused hit her on the forehead and threatened to thrust a bottle into her vagina. PW2 saw the appellant slap PW3 and pulled off her panty and raped her while his accomplice watched. PW4, a registered clinical officer examined PW2 and PW3 and confirmed that they had sustained injuries and produced the P3 forms as exhibits proving that they were assaulted. PW2 has a swollen head and both have been raped by the assailants.

36. On the act of stealing, the prosecution averred that in all three counts, the assailants stole various items including cigarettes, money, alcohol, soda, and a phone. During the appellant's arrest, he was found in possession of PW3's phone which had been stolen, which phone was also produced as an exhibit after having been positively identified by PW3.

37. On identification, it was submitted that the appellant was positively identified in that PW1 stated that the ordeal lasted for 30 minutes despite the same having been at night, there was enough light in that there was electric light which enabled him to mark his face well. While at the police station, he saw the accused person after he had been arrested.

38. Moreover, PW2 positively identified the appellant because she had spent so much time with him and that while they had been taken to the bush in the rope ideal. The appellant opened her phone and demanded her Mpesa and that light from the phone shone upon him and she was able to mark his face. She was even able to identify and describe the appellant as having been shaved and was the tallest among the suspects which was done during cross-examination.

39. It was stated that PW3 positively identified the appellant for she had spent a great deal of time with the assailants and one was shot while the appellant was tall and brown. The tall man called the other 'Wahome.' That the short man told her he wanted to rape her and he had a touch screen phone which had bright light enabling identification. She even described the appellants' eyes and teeth which she said were conspicuous and were not straight and they overlapped which the court agreed with.

40. In the upshot, the prosecution asserted that the conviction of the appellant in the three counts of robbery with violence was proper and without any error whatsoever. With respect to the offenses of gang rape, they averred that the evidence was cogent in that the witnesses gave a vivid description of how the appellant in the company of the accused and other men broke into their house, stole from them, and took them to a nearby forest where they gang raped Nancy Wamaitha and Susan Wachira.

41. PW4 who examined PW2 and PW3 indicated that PW2's vagina was oozing semen and noted that her vagina gas some friction and produced the PRC as exhibit 1. PW3's results were that he saw her head was swollen and upon observing her vagina, he saw semen oozing out of her vagina and saw many sperms, there was some friction and the PRC and P3 forms were produced.

43. Further, it was stated that the offenses of gang rape have been sufficiently proved in that the appellant had been in the company of other assailants and committed the housebreaking and stealing as per count 6 and stole various items from them and later took the complainants in count II and III to a nearby forest and gang raped them in turns. Additionally, they asserted that their identity was positively proven for they spent a great deal of time with the victims and there was also electricity lighting and mobile phone lighting enabling positive identification.

44. In conclusion, the prosecution submitted that the appellant did not disprove the prosecution's evidence when he was put in his defense and that all 6 counts against him were proved therefore his conviction and sentence were proper in the circumstances.

Issues, Analysis and Determination

45. The court having gone through proceedings, the evidence adduced and the parties' submissions, I find the issues are whether the charges were fatally defective. If in negative, Whether the proceedings were fatally defective if negative, finally whether the prosecution proved its case beyond any reasonable doubt, and if in affirmative whether the sentences were excessive to warrant the court to tamper with the same.

46. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyze it, and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanor. (See Kiilu & Another vs. Republic [2005] 1KLR 174 and Okeno vs. Republic [1972] EA 32)

47. First and foremost, although the 1st appellant did not raise the following issues as part of his grounds for appeal the same were raised in his submissions and I found it prudent to consider the same. It was asserted that there was an irregularity in the proceedings that occurred at the time of plea taking of the consolidated charge sheet which rendered the whole trial illegal. The prejudice suffered is that

the proceedings indicate that only five charges were read out to the accused persons. The consolidated charge sheet contains a total of 8 charges and the prosecution did not at any given time apply to withdraw some of the charges to leave 5 charges.

48. Further, It was elaborated that the appellant was found guilty in Count V i.e. the gang rape of Susan Wachira in respect of both accused but the said count related to one Ibrahim Wahome Ndiritu and not to the appellant. From the judgment, both accused persons were found guilty of Count VI which is stated in the judgment as breaking into a building but the charge sheet on page 18 of the record of appeal indicated Count VI as the offence of gang rape on Nancy Wamaitha.

49. Additionally, the appellant asserted that there was a further irregularity noted on counts I-III where the appellant was charged with the offenses of robbery with violence. That the charges were fatally defective for duplicity and that they did not disclose an offense of robbery with violence as the particulars did not indicate that the accused were armed with a dangerous or offensive weapon or instruments that they used violence on the victim and that the victim sustained injuries.

50. I have thoroughly and carefully analyzed the trial court record and the judgment therein and I made several observations. I note that initially there were 8 counts with respect to both appellants as they were charged in separate charge sheets. However, when their files were consolidated, it appears that the trial magistrate condensed 6 charges to include both appellants in one count instead of separate counts with respect to a similar offense. The charges were then consolidated and maintained as follows:

    i. Count I: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code in respect to Freciah Wairimu Rono

    ii. Count II: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code with respect to Susan Wachira Karuri.

    iii. Count III: Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code in respect to Nancy Wamaitha Mwangi.

    iv. Count IV: Gang Rape contrary To Section 10 of the *Sexual Offences Act* No. 3 of 2006 in respect to Susan Wachira Karuri without her consent.

    v. Count V: Gang Rape contrary To Section 10 of the *Sexual Offences Act* No. 3 of 2006 with respect to Nancy Wamaitha Mwangi without her consent.

    vi. Count VI: Breaking into a Building and Committing a Felony contrary to Section 306 (a) of the Penal Code.

51. The appellants then pleaded not guilty to the same and as evidenced in their defense, they both asserted that they understood the charges against them. In my considered view, the appellants herein knew the nature of all the charges they were facing and understood the particulars thereof and therefore the 1st appellant cannot claim that the same were prejudicial to them. In my view, the charges were drafted in accordance with Section 134 of the Criminal Procedure Code. Moreover, the offense in counts 1 to 3 is robbery with violence but with respect to different people, and therefore the same cannot be said to be duplicitous.

52. Further, the trial magistrate in his judgment indicated Counts 4 and 5 to be; “gang rape against Susan Wachira by the accused persons”. However, having read the judgment in totality, it is my considered view that there was a clerical and/or typographical error on the part of the trial magistrate in recording count 5 to be against Susan Wachira instead of Nancy Wamaitha. It is my finding that the mistake is

not one that requires great reasoning in deciding but is what is known as a "slip of the pen" in judicial circles.

53. In my view and specifically in the appeal herein, the errors on the face of the record did not amount to a fatal defect in the prosecution's case and were curable by invoking Section 382 of the Penal Code. Moreover, I hold that in the circumstances of this case, there was no injustice occasioned towards the Appellants and they did not suffer any prejudice as a result of charging him as he was. (See Paul Katana Njuguna vs Republic [2016] eKLR).

Count 1-3

54. The ingredients of this offense were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. in the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows: -

> " In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore-described ingredients constituting robbery is presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below, and any one of which if proved, will constitute the offense under the subsection:
>
> i. (i). If the offender is armed with any dangerous or offensive weapon or instrument; or
>
> ii. (ii). If he is in company with one or more other person or persons; or
>
> iii. (iii). If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

1. (See also Oluoch vs. Republic [1985] KLR).

2. Similarly, in the Court of Appeal case of Criminal Appeal No. 300 of 2007, Dima Denge & Others vs. Republic (2013) eKLR, it was stated as follows:

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

55. Accordingly, the 1st appellant was found guilty on the first count i.e. robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code in respect to Freciah Wairimu Rono who was PW5. She stated that she had closed her bar on 22/8/2018 at 11 pm and went to sleep in her house which was behind the bar when her door was broken and she saw two people with metals and sticks. She testified that she saw four men among then the appellants. PW1 closed the window and called the bar owner after the thugs had run away having stolen money, cigarettes, money, alcohol, and soda.

56. It was her testimony that there was enough light to enable her to see the appellant's faces and that the ordeal had lasted 30 minutes. In cross-examination, she stated that there was electricity that enabled her to mark the appellant's face and that when she heard that thieves had been arrested she went to the police station and saw the 1st appellant through the fence but she saw the 2nd appellant in court for the first time.

57. I find that the 1st appellant was positively identified and that the prosecution proved their case against the 1st appellant for the offense of robbery with violence in respect to count 1 beyond reasonable doubt and therefore the 1st appellant was properly convicted. It is my view that the trial magistrate was right in acquitting the 2nd appellant citing that it is not correct to charge a suspect based on a witness who saw the accused after charges had been preferred. This is different from the case of the 1st appellant whom PW1 said she saw before he was charged and the same was confirmed by PW7.

58. PW2 testified that she was attacked on 23/8/2018 at midnight at a house behind the bar she was working in. Some people hit the bar door with a metal bar and it came off. The thugs entered the house and hit them with clubs demanding money. She was together with her friend Nancy, PW3 who gave out her phone. They then forced PW2 to open the counter and she tried to explain that the bar owner had taken away all the money but the 1st appellant told her to stop talking. Further, she stated that there was enough moonlight and that the thugs were using torches. That one thug struck her with a rungu after she told him that there were only Kshs. 2000/- which was from the pool table collection.

59. It was his testimony that the 1st appellant put the coins in her pocket then she screamed and he pulled her legs then told her to remove her clothes. She was taken to the toilet and after 10 minutes PW3 came and the 1st appellant threatened to thrust a bottle into her vagina. They were then forced to run into the forest then the 1st appellant pulled off her panty and asked her if she was sick before raping her while the others watched. The other thugs hit her with a stick pulled her hair and blamed her for screaming during the robbery.

60. Afterward, the 2nd appellant approached PW3 and asked her if she was sick before raping her. They were later rescued and taken to hospital for treatment. Later, she was able to identify the 1st appellant in the police station as she had spent a lot of time with him. She stated that he was shaved and was the tallest among the suspects.

61. On her part, PW3 corroborated PW2's testimony and stated that she had gone to visit PW2 when they were attacked by thugs. PW2 was taken to the house to search for money whilst she remained with two of the thugs. She was then taken to the bush where she met PW2 with some of the thugs. The 1st appellant then opened her phone and demanded her Mpesa pin. The light from the phone shone upon him and she was able to mark his face.

62. PW3 testified that she was with a short man and the other was tall and brown and she heard him call the short one Wahome. The short man had a touch screen phone which had a bright light and she asked her to sit and the phone light shone on his face severally. He then raped her and another man came and pulled put his penis on her anus although he did not penetrate.

63. They were rescued at around 4 am and later the OCS Olaimuta called her over because her phone had been recovered. She narrated what had happened to her and recognized a KCB slip that was recovered from the 1st appellant's wallet in which Kshs. 1000 had been withdrawn. She also identified the short black man who raped her as the 2nd appellant. PW3 learned that her mobile number was used to send money to the 1st appellant's girlfriend.

64. She reiterated in cross-examination that she was able to identify the 1st appellant because his eyes and teeth were conspicuous and the 2nd appellant was a black short man which the trial court agreed with.

65. PW4 is the clinical officer who examined PW2 and PW3. She testified that PW2's vagina was oozing semen and many sperms were seen and that her vagina had some friction and produced PRC form as Exhibit 1. PW3's results were similar.

66. PW6 was the police officer who arrested the 1st appellant under the report from an informer that he was selling bhang. The accused was problematic at the time of arrest he tried to stab him and PW7. Bhang was recovered in his house as well as a KCB receipt showing withdrawal of Kshs. 1000/-. and two phones. He also found out that the 1st appellant was charged with another criminal case for 5 counts of housebreaking which he later appealed and was released on 6.6.17. It was stated that PW3 brought a box that had a similar IMEI to the phone recovered from the 1st appellant.

67. He also stated that there were investigations in which monies sent to Rose were recovered and upon inquiry, all were cases of robbery. That when the 1st appellant was confronted with the evidence he gave up the 2nd appellant's name as one of those who was involved. PW7 corroborated PW6's testimony.

68. In my considered view and having read the trial court record and assessed the evidence produced, I find that the charges in Counts 2 and 3 were proved beyond reasonable doubt. PW2 and PW3 testified that the thugs hit the door with a metal bar and PW2 was even struck with a rungu at some point. What started as a robbery attack ended up with them being raped as well.

69. Further, the fact that the 1st appellant was caught with a bank slip with PW3's number showing withdrawal of Kshs. 1000/- and PW3 herself confirmed that when the fateful incident was taking place the 1st appellant demanded her mpesa pin which she surrendered and he withdrew monies from her account is indicative that he was at the scene of the crime as described by PW2 and PW3. I also find the eyewitness's evidence to be credible as they were all consistent in their testimonies and their stories tallied on the sequence of the events during the fateful night.

70. The bank slip was discovered by PW6 and PW7 who were on a mission to arrest the 1st appellant for the possession of bhang but they ended up being assaulted by him and stumbled upon the slip. The 1st appellant pleaded guilty to the charges of assault and possession of bhang proving that PW6 and PW7's testimonies were indeed true as to the events that transpired during the 1st appellant's arrest.

71. Moreover, he was arrested with two phones after his girlfriend told the police he had another phone and it turned out that one of the phones had been stolen from PW3 who produced a box with its IMEI number. There was no logical or lawful explanation offered up by the 1st accused detailing how he got a hold of the phone and therefore PW3's account remains the only credible explanation as to how he was in possession of the phone.

72. Moreover, in Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic, Criminal Appeal No. 272 of 2005, the Court of Appeal held:-

> " ....It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

73. Consequently, I find that coupled with the available evidence, the 1st appellant's conviction is also bolstered by the doctrine of recent possession.

74. In Hassan Abdallah Mohammed v Republic [2017] eKLR, it was stated that:

> " Visual identification in criminal cases can cause a miscarriage of justice and should be carefully tested. The court in Wamunga v Republic (1989) KLR 424 at 426 had this to say:
>
> "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 favorable and free from the possibility of error before it can safely make it the basis of a conviction."

75. Accordingly, it is my view that both PW2 and PW3 positively identified the appellants as they had spent a reasonable amount of time with them under electric and phone lights and were even able to mark characteristic features about them, that the court noted as facts. Moreover, according to PW7, the 1st appellant upon being confronted with the evidence against him, confessed and implicated the 2nd appellant leading to his arrest.

76. It is my considered view that the evidence adduced proves beyond reasonable doubt that, the appellants, in company with others and armed with dangerous weapons, robbed the complainants and also used violence on persons thereto immediately before or during, or immediately after the robbery.

Count 4 and 5

77. The elements that the prosecution needs to prove to obtain a guilty verdict in the offense of gang rape are outlined under Section 10 of the *Sexual Offences Act*, as follows:-

a. Commission of rape; Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;

b. In association with another or others, or any other with common intention, is in the company of another or others who commit the offense of rape

c. Positive identification of the perpetrator.

78. Penetration under Section 2 of the Act defines 'penetration' as:

> " ...the partial or complete insertion of the genital organs of a person into the genital organ of another person."

79. Bearing the above provisions in mind, I find that the prosecution proved beyond reasonable doubt the offense of gang rape against the appellants with respect to PW2 and PW3. Their oral testimonies were corroborated by the evidence of PW4, both the appellants were in association including with others not before the court with the common intention to rape the victims after robbing them and the victims positively identified the appellants as the perpetrators of the gang rape.

Count 6

80. PW1 testified that she was working at Thayubar on 22/08/2018 at 11.00 pm when she went to her house after closing the bar which was beside her house when she heard people screaming outside the bar and then her door being broken using metal. She peeped and saw two people with metals and sticks. That there were four men. She closed her window and called the owner of the bar then the police were called but the thugs escaped after stealing Kenya cane 250ml, 2 sodas, I packet of Safari and Supermatch cigarettes, 4 GB USB, and Kshs. 2000 in coins. She stated that there was an electric light.

81. In cross-examination, she confirmed that she was able to identify the 1st appellant because there was enough light, security lights, and moonlight, and could see them clearly from the house. She stated that she heard thieved had been arrested and went to the police station and saw the 1st appellant through the fence and was immediately able to identify him.

82. Section 306(a) of the Penal Code which provides as follows:

> " 306. Any person who:-
>
> a. Breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
>
> b. .....
>
> a. is guilty of a felony and is liable to imprisonment for seven years."

1. Accordantly, I find that the facts and prosecution's evidence particularly against the 1st appellant supports the fact that he was positively identified by PW1 as the person who broke into using metal bars and entered Thayu bar in Ngamini Trading Centre to commit a felony inside of it by stealing several items. Thayu Bar fits the description of the aforementioned buildings. I therefore concur with the trial magistrate's conviction of the 1st appellant.

2. As regards sentencing, the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR, the following was stated with respect to sentencing:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any of the matters already stated is shown to exist."

83. In my view, the sentences meted out by the trial magistrate were appropriate and lawful and I find no reason to interfere with the same.

84. In the premises, the appeal lacks merit and I therefore uphold both the appellants' conviction and sentences. The court thus makes the orders;

i. The appeals on conviction are dismissed and convictions upheld.

ii. The appeals on sentences are dismissed and sentences affirmed.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 7TH DAY OF MARCH 2024.

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CHARLES KARIUKI

JUDGE