Nyakina v Republic (Criminal Appeal E046 of 2022)
[2024] KEHC 8161 (KLR) (5 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E046 OF 2022

MW MUIGAI, J

JULY 5, 2024

BETWEEN

WALTER MOTURI NYAKINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Mavoko delivered by Honorable S. Jalang'o, Principal Magistrate made on the 27th day of September,2022)

JUDGMENT

Background

1. The Appellant herein Walter Moturi Nyakina was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.

2. The particulars of the offence are that on 7th day of September,2021 in Athi River Sub- County within Machakos County, while armed with a knife, robbed one FM a mobile phone make Neon Ray Pro valued at Kshs. 5,000/=, her identification card and during the time of such robbery used actual violence to the said FM.

3. In the alternative count the Appellant herein was charged with handling stolen goods contrary to Section 322 (1) as read with Section 322 (1) of the Penal Code.

4. Particulars being that on the 8th day of September,2021 in Athi River Sub County within Machakos county, the Appellant was found in possession of a mobile phone NEON RAY PRO in make, white in colour valued at Kshs. 5,000/= property of FM.

5. The Appellant was charged with a 3rd count of rape contrary to Section 3 (1) (a) (b) as read with Section 3 (3) of the *Sexual Offences Act* No. 3 of 2006.

6. Particulars of the offence are that on the 18th day of September 2021, at Athi River Sub County, within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of one FM aged 25 years without her consent.

7. The Appellant was charged with an alternative charge of committing an indecent act with an adult contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

8. Particulars of the offence are that on the 18th day of September,2021 at site area in Athi River Sub County within Machakos County the Appellant intentionally and unlawfully committed an indecent act by touching the anus and breast of FM and adult aged 25 years without her consent.

Trial Court's Proceedings On Plea Taking

9. From the Trial Court proceedings, the Appellant was arraigned in court on 20/9/2021 where substance of the charge and every element thereof was stated to the Appellant in the language that he understood and he was asked whether he admits/admitted or denied the truth of all charges. The Appellant replied "Not true".

10. The Trial Court then entered plea of not guilty.

The Hearing

The Prosecution's Case

11. The prosecution's case was anchored on four (4) witnesses who gave their sworn testimonies.

12. On 6/12/2021, the accused was unrepresented when PW1 testified. Trial Court ordered for the case to start a fresh on 9/5/2022 when the new Magistrate took over the matter and was then represented by an Advocate.

13. PW1 was FM. She testified that on 18th September,2021 on a Saturday, she was heading to church and met the appellant on the way. He greeted her and asked her name. PW1 told the Appellant her name and the Appellant asked PW1 if she needed employment. PW1 told the Trial Court that she told him that she needed a job. Testifying that the Appellant told PW1 that a certain company needed two female employees. The Appellant asked for PW1's mobile promising to take her to that company that night. PW1 gave the Appellant her mobile number and proceeded to church.

14. The Appellant called PW1 that night and they met at Nyambura Stage. It was the testimony of PW1 that the Appellant told her to carry her original identity card. PW1 met the Appellant at the stage; they proceeded to the company. PW1 testified that the Appellant told her to wait for him as he wanted to go and pick another lady who was to accompany them. According to PW1 the Appellant came alone and said the lady had gone to the company. They passed Hardpark Company through a certain bush. The Appellant told PW1 that it was a shorter route. The Appellant was ahead of her. Testifying that the accused asked for her identity card and she refused to give him. The Appellant according to PW1 attacked her after PW1 refused to hand over her identity card to the Appellant. PW1 was injured on the lower lip and the Appellant continued to attack PW1 as he asked for her identity card. She gave Appellant her identity card. The Appellant demanded for PW1's phone which phone was off because the back cover had come off. PW1 switched on her phone PW1 unlocked the phone. PW1 told the Trial Court that the Appellant demanded she send him money via Mpesa. PW1 did not have money in her Mpesa and she tried to 'fuliza' but it was unsuccessful.

15. It was her testimony that the Appellant requested for her Mpesa pin; she gave him the pin. She testified further that the Appellant took away her phone and demanded to know the price of the phone. PW1

told him it is her brother who bought it for her. PW1 testified that the Appellant told her he wanted to have sex with her. PW1 told him that she was in her menstrual period (she cried). The Appellant wanted to confirm if indeed she was on menstrual period (PW1 sobbed). It was her testimony that the Appellant removed her clothes and found she was on her periods and the Appellant told PW1 to lie down on her stomach asking her if she was HIV/Aids positive. PW1 told him she did not know. The Appellant removed her Panty, wore a condom and inserted his penis in PW1'S anus, raped her thereafter, and put his clothes on. He told PW1 not wake up until he comes back and to put her clothes on. She told Trial Court that the Appellant ran away. PW1 put on her clothes and went home.

16. PW1 went to police station with her brother-in-law. She recorded her statements and went to Nairobi Women Hospital in Kitengela and at 11PM while in Hospital she got a call from the police asking her the description of her phone. PW1 told the Police it is make Neon Phone. PW1 was informed that the accused had been arrested and the following day she went to police station and gave the police receipt for the phone and her blood stained clothes. According to PW1 an Identification Parade was conducted. PW1 was able to identify the accused from identification parade. Testifying that the accused had changed his clothes. PW1 was able to identify the Appellant. The Exhibits produced were;Neon phone- MFI 1aReceipt for phone MFI- 1bSim card MFI- 1cOriginal Id MFI 2Used condom MFI 3Two Masks MFI 4 a, b Black and blueBlood stained leso MFI 5 aP3 form MFI 6aGVRC Form 6bLab results MFI 6d

17. PW1 had seen the accused during the day. PW1 marked his face. The incident happened same day. ID Parade Form was produced - MFI-7. PW1 believed the Appellant who told her he is saved man who goes to Church near KMC. PW1 was wearing the blue mask. The Appellant wore black mask MFI 4 a, b. PW1 told Trial Court that the Appellant penetrated her on her anus with his penis. The Appellant threatened to kill her and PW1 screamed during the ordeal. The Appellant forcefully removed her clothes and there was noise coming from the nearby company; if she screamed no one would have heard her. The Appellant was armed with a knife.

18. In cross-examination, it was PW1's testimony that she met the accused on road near certain plot. PW1 was alone it was 11PM. Testifying that the Appellant greeted her. PW1 did not know him prior to incident. PW1 was in need of employment that is why PW1 talked to him. According to PW1, the Appellant told her that the company needed two female employees, PW1 did not confirm he owns company. It was her testimony that the Appellant had carried shoes, He told PW1 that he used the shoes in the company. It was her testimony that in her statement she had indicated that the Appellant said he works in a company that manufactures shoes. PW1 told the Trial Court that the Appellant gave her his number; she could not recall number off head. That police number is in her phone. PW1 testified that she could check mobile number in the phone which the appellant took. The mobile number is registered her name and they talked with the Appellant for a period of 20 minutes.

19. PW1 could not remember exact clothing he was wearing during identification, The Appellant was wearing different clothes. PW1 told the Trial Court that the Appellant called her at night at 7 p.m., Appellant told her that there were two women needed, Appellant told her to wait as he looks for other women. PW1 did not know who employs people and that she has learnt her lesson after incident. The Appellant told PW1 that is was Hard Park company and told her that his name is James. On arrival at HardPark the Appellant told her they pass through certain bush. PW1 accepted. They had passed other people on the way. She did not know the location of company, there was light at Company. The incident happened 100 meters from the main gate of the Company. That at the bush PW1 tried to scream but the Appellant threatened to kill her. According to PW1 the Appellant spoke in Kiswahili and the incident happened for five minutes. The Appellant had injured PW1 on the lips. She told the police that the assailant is called James. PW1 had not known him prior to the incident. The P3 form

indicates the assailant is known to her. PW1 said she was able to identify him because she had seen him during the day on the material day. PW1 told doctor and police that the assailant is known to her.

20. The Appellant told the police that his name is James. PW1 came to know his true name at 'the police station. The police were looking for the Appellant. He had done something similar and the police called other victims of crime, PW1 was just to identity the Appellant. The other victim came and identified the Appellant. PW1 gave her mother-in-law phone number of the Appellant. She had not given the Appellant's description. Testifying that identification parade had more than ten participants and could not remember the description of other participants, she was at police station.

21. PW1 did not remember location of the Appellant in identification parade and that he had worn trousers which resembled military jungle. PW1 went to hospital. She was treated. PW1 was injured on the lips and body. She was examined and injected. She was treated at Nairobi Women and not Athi River Hospital, she could avail treatment notes. The exhibits were found at the scene. The Appellant was found with PW1's phone and ID, the Appellant went away with her and phone.

22. She denied having an affair with Appellant, PW1 met the Appellant during the material day incident happened. PW1 went to hospital at 10. PM and she was called at 11.pm while in the hospital when the Appellant was arrested. The police when she went home called her and asked her to describe her phone, PW1 testified that she had receipt of her phone. She told police she lost her phone. That the Appellant was armed with a knife. PW1 did not know if knife was recovered. PW1 identified her phone which bought at 4,500/= she did not recall how much was recorded by police. PW1 testified that the leso belonged to her mother. PW1 was bleeding when going to hospital. Her mother gave it to her to wipe blood. They went to the scene the following day and that is where they recovered condom and two masks, sim cards. It was her testimony that the two simcards belonged to her. The Appellant was found with other phones.

23. In re-examination, she said she did not know the Appellant prior to incident. Known to PW1 means that PW1 was able to identify the assailant. That the police did not ask her description of assailant. Testifying that the parade had more than ten participants. PW1 was able to identify the accused. That after the arrest of the Appellant, she came to know his official name. PW1 had no affair with the Appellant. Testifying that the Appellant's number is in the phone. PW1 has saved him as James and that if they check Safaricom data, it will confirm that they only spoke on material day. The Appellant had changed his clothes during parade. That the Appellant told PW1 he was a saved man he also told PW1 that he would be in company of another lady. PW1 believed him.

24. PW2 was John Njuguna. He told Trial Court that he is a Clinical Officer at Nairobi Women Hospital and has a diploma in Clinical Medicine and Pharmacy from MKU University. He gave his testimony on behalf of his colleague Dr. Stephen Ochines Otieno who proceeded for further studies. PW2 was familiar with his handwriting and signature having worked together for many years. He testified that he had GBRC Form of victim, PW1 who was attended to on the 19th September, 2021. The person was aged 25 years old brought by her mother with a history of having been raped by a person well known to her namely James. According to PW2, during examination she had physical injuries bruises on her chin.

25. There was no sexually transmitted infection found during analysis. PW2 produced the GBRC as exhibit. PW2 had a PRC form of patient. She was examined on 19th September,2021. She reported of assault, penal-anal using condom by the accused person. During examination it was noted bruises on her chin. That on genital it was normal external genitalia. Normal vaginal examination. That hymen was old ragged. Testifying that the anus had normal tone. The lab did not show any transmitted infection. He produced PRC form as exhibits. PW2 testified that he had P3 Form of patient and that she was fair general condition with clean cloth, no tear no blood.

26. Further, he told Trial Court that during examination normal head and neck examination, normal thorax and abdomen. Normal examination on lower and upper limb and on genital examination normal labia majora and minora and no discharge noted. PW2 produced P3 Form as exhibit.

27. In cross-examination, he stated that patient knew the assailant as James. The complainant had bruises on chin and that was recorded on GBRC and PRC. The P3 Form was written head and neck. He indicated normal, no injuries noted in the P3 form. According to PW2 the GBRC Form is alleged rape and physical assault. No genital findings. He further told Trial Court that the outer genitalia was normal and that the vagina had been penetrated. PW2 testified that normal did not mean that nothing happened and that the anus had normal tone. PW2 was not aware if there was penetration of anus and that the Appellant is charged with rape. That the patient made a report of rape on anal region and the examination showed normal findings.

28. In re- examination, PW2 indicated normal anal tone. It means ability of the patient to hold stool is okay. No tears in the anus. The patient's history indicated penetration on anus and that some patients have normal examination findings.

29. PW3 was SM. She told the Trial Court that on 18th September,2022 at 1p.m she came from work and found her daughter in law the complainant had gone to church. PW3 testified that the complainant went home and informed her that the Appellant promised to get her cleaning job at Rhino Cement and that they agreed to meet at 7. P.m. PW3 told the Complainant not to go but she insisted to go and get employment. She asked for the phone number of the person who promised her job. Testifying that later at around 8 pm PW1 came back with an old man and that she did not talk.

30. It was the testimony of PW3 that the old man told her that complainant had emerged from the bush crying that she had been raped and robbed. That the old man told her not to call the assailant. He advised them to go and report to police. They made a report to police and gave the police the number. Testifying that the police found that the number was registered in the name of Walter Mutori and they were directed to go to the hospital. PW3 noticed that the complainant was bleeding from the mouth and she gave her the leso to wipe the blood; they proceeded to the hospital and the complainant was examined. PW3 got a call from the police station. the police requested to talk to complainant; she described her lost phone. The police informed them that they had arrested the assailant. It was PW3's testimony that the complainant left home at 7pm and they met opposite Sulami supermarket. The complainant told her that the person was a stranger to her and that he had a red jacket with blood stains. That the Kikoi had blood stains (MFI-5 A, B). PW3 told the trial court that the complainant told her that she was assaulted and robbed phone, ID; that she was raped.

31. In cross-examination, it was her testimony that she stayed with the complainant since 2021 and that she was not employed. That the complainant gave her the number of the assailant; she did not call the number as she was warned not to call the number. Testifying that she warned the complainant not to go and meet stranger; the complainant went alone to meet the stranger. Testifying that she recorded her statement and in her statement she indicated that the complainant went with her neigbour.

32. She told Trial Court that the complainant left the house alone and met the stranger opposite Sulami Supermarket and that the complaint and the Appellant were strangers, stating that if someone promise a job you would go out and meet the stranger. That it is not normal to meet a stranger. Testifying further that the complainant went at around 7p.m and returned at 8pm when she had injuries; that she was bleeding. It was her testimony that the complainant while boarding a vehicle bled profusely, the jacket and scarf were blood stained. The complainant told PW3 that the stranger was called James and that the complainant was treated at Nairobi Women Hospital. PW3 gave the police the mobile

number of the assailant and the officer confirmed that the mobile number is registered in the name of the Appellant. They found the phone recovered by the police.

33. In re-examination, she told Trial Court that the complainant had closed her mouth to avoid shame by neigbours. The complainant left home alone. PW3 could not confirm if she was in company of neighbour and that most women are looking for jobs as the complainant is young.

34. PW4 was No. 88421 CPL Caroline Seet. She testified that she was the I.O and that on 18th February,2021 at around 2100 hours she got a call from colleagues at report office telling her that a report of robbery had been made, the victim had been raped. PW4 went and met the complaint who was in the company of her mother in law who told her that she met a stranger while going to church and that the Appellant promised her to get a job and they agreed to meet same day at 7pm to go to Rhino Cement. They met at 7pm at Nyambura and proceeded to the area.

35. That the Appellant requested for the complainant's ID; the complainant refused to give him the ID, the Appellant attacked her with kicks and blows. The complainant was wearing blood stained jacket. PW4 told the Trial Court that complainant had given the mother -in -law the mobile number of the assailant. That there were other reports made of similar nature. PW4 requested for data of the mobile number, she checked the mobile number given by complainant and confirmed it had same number which they were investigating.

36. PW4 told the CID officers to locate number for her as she had received information of the assailant. PW4 got location that the person is within the Site area. PW4 directed complainant to proceed to hospital she requested P.C Murage and PC Sanya to accompany her to area where the Appellant resides. PW4 was aware of his house. PW4 got location from informers. She went and found Appellant at his home together with his wife and children. That the Appellant gave PW4 his ID No. 37xxxxxx and name Walter Moturi Nyakina. The names were the same as that which she had sent to Safaricom and was confirmed.

37. They did a search in the house and recovered several mobile phones. They recovered several mobile phones the one for complainant was included; which was Neo Ray Pro and other mobile phones. They managed to arrest the accused. PW4 called mother in law of complainant informing her of arrest of assailant. Testifying that on 19th February, 2021 the complainant identification and recovered phone. According to PW4 she also availed the receipt of phone. PW4 informed other victims who had been robbed and/or raped by the Appellant.

38. PW4 told the Trial Court that ID parade was conducted by Inspector Kalimba with the accused paraded amongst the eight other men. Testifying that the accused was positively identified by the complainant she accompanied complainant to scene of crime. PW4 was able to recover two simcards belonging to complainant. They also recovered used condom and masks.

39. PW4 stated that the Appellant raped the complainant on the anus when she was on her menstrual periods. PW4 also recovered two face masks for the Appellant and complainant. The complainant identified a receipt that she used to travel from her rural home to Athi River. They found receipts at scene. PW4 prepared current charge sheet against the Appellant and confirm that the complainant was bleeding from the mouth; she was also crying at the scene where there was a bush and other companies. The incident happened at night during curfew period. As per PW4, the complainant was desperately looking for employment. That complainant and Appellant met during the day and she was able to identify Appellant. PW4 produced the following exhibits; Phone Exh 1A, simcards Exh No. IC, D, Complainant ID Exh 2B, used Condom- Exh. No. 3, Two face masks Exh. 4A, B, Leso and red jacket Exh. No. 5A, B Respectively and ID Parade Form Exh. No. 7.

40. In cross-examination, PW4 testified that she got information from the complainant. That the complainant met Appellant during day for short period. PW4 got number of Appellant by mother in law of complainant and it was 072xxxx535. PW4 ascertained the Appellant was owner of the said phone. PW4 did not produce report from Safaricom; she had details of the Appellant who had committed many cases of rape. PW4 did not use her phone to check details of Appellant. She used her informer to get Appellant's home.

41. PW4 was looking for Appellant for a period of one year, she told complainant that there were numerous similar cases made against same assailant who referred to himself as James. They arrested him at 10pm and it took 30 minutes to arrest and search the Appellant. She prepared an inventory, it was in the police file; she did not produce it; they had a record of everything requested. The Appellant was serial rapist of people are desperately looking for jobs. The curfew hours was at 10pm. It was testified that there are several companies around Athi River. That the Appellant did not work in company. It was the testimony of PW4 that the complainant was wearing blood stained jacket and Kikoi.

42. PW4 visited scene which was opposite Rhino in the bush which was a dark place. She collected what PW4 recovered that the complainant identified the recovered items; they collected used condom. PW4 did not take any samples from the Appellant, they wanted the Appellant to be identified before they take samples. They paraded the accused with persons of same height. The complainant said she could identify the assailant. That the complainant identified the Appellant in the ID parade. PW4 did not describe the Appellant to complainants. They paraded eight people. The Appellant was informed of the right to be represented in ID parade. According to PW4 the Appellant indicated that he was comfortable with ID parade to be conducted and the Appellant signed ID parade and they did not provide the Appellant with advocate. The Appellant never wanted to be represented. PW4 was present when ID parade was conducted. The ID parade was conducted by Inspector Kalimba Deputy OCS Athi River. PW4 interrogated the Appellant who told him that he goes to church where he was told to rape many women. PW4 looked at documents at Nairobi women. The complainant had injuries on her lips.

43. In re-examination, she told the Trial Court that she cannot tell if there was penetration. PW4 did not have pre-determined mind that the Appellant had committed offence. PW4 had data of Appellant's mobile number.

Trial Court Ruling on a case to answer

44. The Court vide its ruling dated 25/7/2022 found that the prosecution had established a prima facie case against the Appellant. He has a case to answer. The Court placed the Appellant on his defense.

Defence case at the Trial Court

45. DW1 was Walter Moturi. He testified that in October,2020 he was heading to stage Vanillas when he met a young lady called FM. She was going to meet her sister in Nairobi. That they exchanged mobile numbers. They continued to communicate. Testifying that they had an affair and she asked if DW1 was married. She got annoyed and threatened him. Testifying that in the month of October 2021 she called him and threatened him again. DW1 went to work at Great Wall Garden. DW1 went home and at around midnight three police officers came and arrested him at home. DW1 was not informed reason for his arrest. PW4 was taken to police station. The police told him that he had raped FM. DW1 was not taken to hospital. That the following day the complainant went to police station. she claimed DWI had stolen her phone.

46. He said that the complainant had warned DWI that she would use money to frustrate him. Testifying that on material day as alleged DW1 did not leave the house because of curfew. That he did not call the complainant. Testifying that the ID parade was done yet they knew each other. It was his testimony that nothing was recovered from him, no inventory was prepared. That the complainant investigated and knew his home.

47. DW1 said he had an affair with the complainant. That the complainant got annoyed because DW1 was married man. It was DW1's testimony that on the 18th September, 2021 was Saturday. DWI left home in the morning and went to work until 5:30 pm and went home. DW1 did not leave home and no investigation was conducted.

48. In cross-examination, DW1 told the trial Court that he had been charged with two other related charges and he did not call the complainant. DW1 was not found with the phone and the complainant was not present when he was arrested.

49. In re-examination, he testified that no Safaricom data was availed in court. that the complainant looked for other girls to frame him. DW1 told Trial Court that the complainant directed police to his home.

50. The matter at the Trial Court was canvassed by way of written submissions.

Trial Court's Judgment

51. The Trial Court vide its judgment dated and delivered on 27th September,2022 found that the prosecution had proved its case beyond reasonable doubt as required by law and found the Appellant guilty of rape contrary to Section 3 (1) (a) (b) of the *Sexual Offences act* No. 3 of 2006, convicting the Appellant under Section 215 of the Criminal Procedure Code. The Trial Court having found the Appellant guilty on the main count made no finding on the alternative count.

52. The Appellant was sentenced to serve 20 years imprisonment for count one and 10 years for the second count. The sentences are to run consecutively.

The Appeal

53. Dissatisfied with the judgment the Appellant vide Memorandum of Appeal filed 13th October,2022 and filed in court on 17th March,2023, wherein the Appellant sought orders that:

    1. The appeal be allowed.

    2. The Court exercises its original and inherent jurisdiction to protect fundamental rights and freedoms quashing the Appellant's conviction and setting aside the sentence and consequently discharging the Appellant and releasing him forthwith.

    3. Any other or further relief the court deems fit to grant

54. The Appeal was premised on the following grounds that:

    a. The Learned Trial Magistrate erred in law and in fact by misunderstanding the nature of the offence and evidence placed before him, when he found that PW4, s evidence placed the Appellant firmly at the scene of crime, thus proving he had committed robbery, while PW4 clearly stated that the evidence he produced before court was not captured in any inventory and was not before court.

b. The Learned Trial Magistrate erred in law by finding that circumstantial evidence pointed towards the Appellant's guilt without any corroborative evidence and failing to deduce that the prosecution case lacks ingredients of the offence.

c. The Learned Trial Magistrate erred in law and in fact by failing to take necessary precaution on relying on visual evidence as required in identification and recognition of the offence alleged.

d. The Learned Trial Magistrate erred in admitting inadmissible evidence and irregularly/illegally obtained evidence and proceeding to convict the Appellant based on such evidence.

e. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on mere suspicion and hearsay of the witnesses without tangible evidence.

f. The Learned Trial Magistrate erred in law and in fact by failing to diligently analyze the evidence adduced during trial hence arriving at a wrong conclusion.

g. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on defective charge sheet as to date and details of the cases.

h. The Learned Trial Magistrate erred in law and in fact in not observing that the charge sheet was fatally defective and sentencing the appellant on it.

i. The Learned Trial Magistrate erred in law and in fact by failing to consider elements of robbery with violence, rape and indecent act with an adult.

j. The Learned Trial Magistrate erred in law and in fact by relying heavily on his opinion to convict the Appellant.

k. The Learned Trial Magistrate erred in law and in fact by finding that the prosecution proved its case beyond reasonable doubt.

l. The Learned Trial Magistrate erred in law and in fact by taking into account irrelevant factors and applied the wrong principles in sentencing by failing to take into account the period spent by the Appellant in remand.

m. In all the circumstances, the sentence imposed is excessive, harsh and unreasonable and it would be fair and just to set aside or vary the same.

55. The appeal was canvassed by way of written submissions

SUBMISSIONS

The Appellant's submissions

56. The Appellant in his submissions dated 22nd January,2024 and filed on 30th January,2024, wherein counsel for the Appellant raised the following issues which were submitted on sequentially.

57. On whether the ingredients of robbery with violence had been established, counsel opined that robbery with violence is committed in the following circumstances.

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

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

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

58. Counsel submitted that according to the charge sheet, it is alleged that the Appellant was armed with a weapon namely a kitchen knife however, no solid evidence was led to establish that the Appellant was present at the scene of crime or armed with the said offensive weapon. Opining that no evidence was produced to confirm whether the kitchen knife alleged to have been used by the Appellant was ever recovered or it was found in the custody of the Appellant.

59. It was submitted by the counsel for the Appellant that failure to produce the receipt for the phone means that there is no proof of ownership of the allegedly stolen phone and that the charge before this Honorable Court has thus not been sustained as theft has not been proved and as such the same must fall.

60. To buttress the above position reliance was placed on the cases of Gilbert Kipkoech Cheruiyot vs republic [2020] eKLR and Joseph Maina Wamaitha Vs Republic (2021) eklr,

61. Regarding whether the Appellant was positively identified as being involved in the offences complained of, counsel submitted that during cross-examination PW1 confirmed that she only came to learn of the Appellant's name at the police station and that she was informed that the Appellant had committed similar acts and that other victims were contacted who came and identified the appellant in the identification parade which can only mean that it is possible PW1 felt pressurized to positively identify the Appellant not because she knew him but because she now believed that the Appellant was part of the line up in the identification parade.

62. It was argued that the only evidence being relied upon by the prosecution to link the Appellants to the offence is the evidence of the complainant (PW1) who alleges to have seen and marked the face of the Appellant even prior to the alleged identification parade which was not even proved to have taken place. Submitting that Appellant did not commit the offences and that his arraignment in court and prosecution was without basis as he was not positively identified.

63. Credence was placed in the case of Titus Wambua vs Republic [2016] eklr where the court emphasized the need for positive identification of a suspect. Similarly, counsel referred to the case of Karanja & another Vs Republic [2004] 2 KLR. Submitting that testimony of a single witness namely PW1 cannot be fully relied upon for just conclusion to be made that the Appellant was the one alleged to have committed the offences complained of. to buttress this position, counsel relied on the case of Kiilu & Another Vs Republic [2005]1 KLR 174.

64. It was contended that PW1 did not identify or give any relevant description of the Appellant when she made her statement at the police station and tis clearly proved that she was not sure of the attacker's identity. To cement this position counsel relied on the case of *George Maraba Machogu & Others Vs Republic [2017] Eklr Criminal Appeal 23 of 2017* and peter Githinji Nganga Vs Republic [2022] eKLR.

65. Contending that because PW1 was not sure of the identity of the attackers, there was need for corroboration of her evidence. The identification evidence in this case was not corroborated and as per the determination of the court the Appellant ought to have been acquitted. Counsel submitted that the identification parade in the instant case was flawed and as such cannot be said to have any probative value since PW1 only purported to identify a person whom she already knew and prior to that moment she had not even described him to the police so as to ensure that proper steps are taken in line with the Police Standing Orders as regards the conduct of identification parade.

66. Counsel opined that as regards illegally obtained evidence, he pointed out the case of Anthony Watuku Kibandi Vs Republic [2020] eklr and submitted that the Appellant when put on his defense did bring out the issue of alibi claiming that on the day of the offence he had reported to his work place and that

afterwards went back to his home and that he was actually asleep up until he was awoken by the police on suspicion of having perpetrated the offences he has since been currently charged.

67. It was contended that no evidence was ever led that placed him at the scene of crime and indeed admittedly and as analyzed. That the arrest of the Appellant was not based on any investigation nor any evidence linking him to the crimes alleged that he committed but rather the fact that he was being investigated.

68. On whether the elements of the offences of rape or indecent acts were proved beyond reasonable doubt, it was the counsel's contention that for the offence of rape to be proved as against the Appellant, two ingredients of defilement being penetration and identification of assailant must be proved.

69. It was the case of the Appellant that PW1 testified that she had been anally raped by Appellant and in a bid to prove this prosecution called one Mr. Njuguna who testified that on genital examination it was normal external genitalia, normal vaginal examination and that the anus had normal tone and that PW1 was in a fair general condition with clean cloth, no tear and no blood and on genitalia examination it was normal labia Majora and minora and no discharge noted. Counsel noted that no evidence was produced to prove penetration as PW2 testified that anus had a normal tone and when asked about whether samples were taken he could not confirm the same and as such no evidence linking the Appellant to the offence of rape charged

70. As regards the charge of indecent act with an adult, counsel argued that the facts as stated do not support the charge because they bring out factual improbability due to the fact that the offence of rape was alleged to have been perpetrated at mining area and as such it is highly improbable that the indecent act would at the same time happen at site area as stated.

71. It was contended that at paragraph 59 of the judgment the learned Trial Magistrate noted that the presence of the used condom was proof enough that the Appellant inserted his genital organ in the anus of the Complainant notwithstanding the fact that the same was not subjected to any forensic examination so as to ensure that the said condom allegedly recovered from the crime scene was indeed used by the Appellant to the exclusion of everyone else.

72. To sum up counsel beseeched and implored this Honorable Court to find that the learned Trial Magistrate erred in law and fact in convicting the Appellant for the reasons argued above and to thus acquit the Appellant under Section 354 (3) (a) of the CPC.

Respondent's submissions

73. The Respondent in its submissions dated and filed in court on 23rd May,2023, wherein state counsel submitted on the grounds that:

74. The Learned Trial Magistrate erred in law and in fact by misunderstanding the nature of the offence and evidence placed before him, when he found that PW4, s evidence placed the Appellant firmly at the scene of crime, thus proving he had committed robbery, while PW4 clearly stated that the evidence he produced before court was not captured in any inventory and was not before court, submitting that the Trial Court was right to rely on the testimony of PW4 based on the doctrine of recent possession.

75. Contending that the Appellant was arrested on the same day the offence was committed and the investigating officer was able to recover the victim's phone, two sim cards and identification card from the Appellant's house.

76. The Learned Trial Magistrate erred in law by finding that circumstantial evidence pointed towards the Appellant's guilt without any corroborative evidence and failing to deduce that the prosecution case

lacks ingredients of the offence, counsel relied on Section 296 (2) of the Penal Code and relied on the case of Oluoch Vs Republic [1985] KLR, and submitted that the prosecution adduced very cogent and consistent evidence to prove the guilt of the Appellant. The victim in her testimony before Trial Court, was able to identify the Appellant, as the individual who duped her with a job opportunity. That she later in the evening met him again, when the ill-fateful ordeal occurred to her. State counsel relied on Section 3 (1) (b) as read with Section 3 (3) of the *Sexual Offences Act*. further counsel pointed the case of Republic Vs Oyier [1985] KLR Pg 353 submitting that PW2 testimony in court clearly showed that the victim had physical injuries bruises on the chin and that recovered used condom from the crime scene proved that the victim was raped

77. On the third ground of the Appeal, counsel for the state opined that the Trial Court was right in relying on direct evidence from the victim. The Identification Parade was carried out appropriately, whereupon the appellant was identified by PWI.

78. On the fourth ground of the appeal, it was the submission of the state that the evidence adduced by the prosecution was admissible to court. the direct evidence from PW implicated the Appellant as the main culprit of the offence.

79. As to the fifth ground of the Appeal, it was argued that the prosecution availed direct evidence linking the Appellant to the ill-fateful ordeal. The Appellant was identified appropriately by PW1 who was able to see him during the day.

80. With regard to the sixth ground of the Appeal, state counsel averred that the Trial Court was right in considering that the Appellant was involved in the robbery and rape of the victim. The fact that the Appellant was properly identified by the victim and when he was arrested with the victim's mobile phone, clearly places him at the scene.

81. On the seventh ground of appeal, reliance was placed on Section 382 of CPC, and averred the defect can be cured appropriately.

82. On the eighth ground of the said appeal, state counsel opined by the Trial Court was right in convicting the Appellant based on the overwhelming evidence adduced by the prosecution.

83. Regarding the ninth ground of the appeal, it was the contention of the state that the Trial Court considered the main counts of the offences. The ingredients of robbery with violence and rape were proved and the Appellant was convicted on the main count to the exclusion of the alternative counts.

84. As to the tenth ground of the appeal, counsel contended that the Trial Court relied on direct and documentary evidence, adduced by the prosecution to convict the Appellant.

85. On the eleventh ground of Appeal, it was opined that the prosecution proved its case beyond a shadow of doubt. The Appellant was properly identified as the perpetrator of the heinous act by PW1. The ID Parade and medical evidence sealed the deal in this case.

86. With regards to the twelfth ground, counsel posited that the Trial Court was right in sentencing the Appellant to 20 years imprisonment for count 1. Reliance was made on Section 296 (2) of the Penal Code which provides for death sentence.

87. On the final ground of appeal, state counsel observed that the Trial Court was right to impose the 20-year sentence for count 1 similarly for count 2 the 10 years sentence and not excessive. Submitting that the conviction and sentence against the Appellant was sufficient.

Determination/analysis

88. I have considered the Trial Court Record, the grounds of Appeal and the submissions of the parties and find that the issues for determination are as follows;

    a. Whether the offence of robbery with violence was proved

    b. Whether the offence of rape was proved

    c. Whether the defence of alibi was proved

    d. Whether the sentence should be interfered with

89. This being a first appeal , as stated in the case of Okeno vs. Republic [1972] EA 32, The court stated that;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh HCCRA E042 OF 21 Page 17 of 39 conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424."

Robbery With Violence Charge

90. The first issue is whether the offence of robbery with violence was proved.Section 296(2) of the Penal Code provides as follows:

    (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

    (2) 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.

91. Robbery is defined in Section 295 of the Penal code which states that;

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

92. In Masaku vs. Republic [2008] KLR 604, the Court reiterated that:

> " It is now well settled that any one of the following [emphasis added] need be proved to establish the offence:
>
> (1) If the offender is armed with any dangerous or offensive weapon or instrument or

(2) If the offender is in the company of one or more offenders or

(3) If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.

In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is sufficient.

93. The Appellant submitted that the charge-sheet/ information was defective and it did not disclose the ingredients of offences of robbery with violence, rape and /or indecent assault and date and details of the offences.

94. The Appellant also took issue with the standard and burden of proof and the fact that the case at hand was not proved beyond reasonable doubt. There was no corroboration to the single witness evidence. There was no Inventory produced of recovered items. The evidence on Trial Court Record was referred to as hearsay and suspicion.

95. The Trial Court record indicated admission of inadmissible evidence which was alleged to be illegally obtained evidence.

96. The Appellant took issue and alleged that wrong principles of sentencing were applied and resulted to excessive harsh and unreasonable sentence meted out by the Trial Court.

97. In criminal case the burden of proof solely rests with the Prosecution. In the celebrated case of H.L(E)Woolmington vs. DPP [1935] A.C 462 pp. 481, Viscount Sankey L.C held that:-

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

98. The standard of proof is proof beyond reasonable doubt. According to Lord Denning on what is proof beyond reasonable doubt in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 stated that:-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

99. In this case, PW1 the Complainant testified that she met the Appellant on her way to Church on 18/9/ 2021 and he approached if she wanted a job and she agreed. PW1 gave the Appellant her mobile

number. He called her that night and they met, she brought her Identity Card. They headed to the Company and she was led to a nearby bush. He accosted her and snatched her ID card, Phone and forcibly had carnal knowledge in form of anal penetration on her.

100. The charge sheet in the particulars of offence mentions a knife but PW1's evidence made reference to the knife but it was not produced as part of exhibits. The Appellant said to have been armed with a knife and to have stolen a mobile phone make NEON RAY which was found in his possession as per evidence of PW3. The Respondent produced a receipt of purchase of the mobile phone and photographs of the Neon Ray Phone and the actual phone as exhibit before the Trial Court.

101. The prosecution also managed to produce the mobile phone as Exhibit In addition, the Appellant was positively identified by the Respondent at the scene and also during the identification parade as she had seen him clearly when they met and talked earlier in the day.

102. The Appellant objected to the fact the evidence of PW1 a single witness did not satisfy the standard of proof beyond reasonable doubt that the Prosecution ought to prove.

103. On what corroboration is, was discussed in DPP v Kilbourne 91973) 1 ALL ER 440; (1973) AC 720 (1916) 2 KB 658, where Chief Justice Read says,

> " Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it."

104. The Trial Court record contains evidence of PW2 & PW4 that is circumstantial evidence and corroborates the evidence by PW1. PW2 who examined PW1 found her to be normal and the examination indicated that she was normal save for observing she was bruised on her lips and was consistent with injuries sustained during the attack and forcible rape through anal penetration and theft of her phone.

105. PW3 confirmed PW1 told her she met a man who promised to get a job. She later left in the evening and when she came home, she was brought by an old man and she had a blood stained red jacket and kikoi and PW1 told her she was raped and ID and her phone were stolen. They both went to hospital and to the Police. She recorded her statement that PW1 told her she met James and had given her his number which she gave the police and traced the Appellant.

106. PW4 the Investigation Officer, confirmed she was called by colleagues and was informed of the robbery. She met PW1 & PW2 and they explained the ordeal on PW1 by the Appellant. PWI gave her his mobile number and she asked CID officers to help her. They helped get details of the registered owner of the number 072xxxx535 and received details as follows ID No 37xxxx81 with names Walter Moturi Nyakina. She traced his house through informers. The Appellant was arrested and upon searching his house various phones were recovered among them the Complainants phone make Neon Ray Pro. The Identification parade was conducted by Deputy OCS Inspector Kalimba Athi River.

106. The Appellant in his defence claimed knowing the complainant as he wondered why an identification parade was conducted yet they knew each other. The evidence of PW1 she denied that she was in a relationship with the Appellant. The appellant's claim is not borne out by the evidence on record, why would he snatch her phone if they knew each other and it is recovered from him after investigations? If they had/were in a relationship why would she frame him on robbery and rape and not at least one of the offences? Why did the complainant disclose to PW2 her mission that evening and give her James number if there was an affair?

107. Therefore, as stated in the case above, PW1's testimony was considered by Trial Court as credible, PW2 who gave Appellant's phone number when she took PW1 to the Police Station, PW4 who helped recover PW1's phone from Appellant's house after she obtained his number and traced it to the Appellant, his details and his house and recovered the phone and its photographs produced as exhibit in Court. The receipt of purchase of the phone to establish ownership by PW1 was produced as Exhibit in Court and confirmed theft of her phone and ID card on the fateful night by the Appellant.

108. Was there violence sufficient to prove an element in the definition of robbery with violence? The alleged knife was not produced although PW1 did refer to the knife and that she was attacked by the appellant and bruised on the lips and he demanded her phone removal of money through 'fuliza' and her ID card. PW1 was attacked by the Appellant during the ordeal.

109. Further, the medical evidence indicates that violence was meted upon the Respondent. She had a wound on the mouth that was presented in evidence by herself and the medical reports produced in Court. PW1 was able to identify the appellant as they met earlier on in the day on the fateful day and exchanged phone number with the Appellant promising to get her a job and that he would call her. PW1 had ample time to see and talk with the appellant in broad daylight and was relaxed. Then met again in the evening and was accosted and robbed the phone. Both instances of meeting were sufficient have a positive identification, during the identification parade and the ID parade Form was produced under Section 77 *Evidence Act*.

110. The Charge sheet/information was in compliance with Section 134 of Criminal Procedure Code. The Ingredients of robbery with violence were proved. PW1 suffered violence in the course of theft of her phone and ID. I therefore find that the Appellant was indeed guilty of the offence of robbery with violence and the ingredients of theft of PW1's phone and during the ordeal PW1 was attacked by the Appellant in the process. There is sufficient evidence on record circumstantial evidence of recovery of the phone and conducive circumstances for positive identification.

Offence of Rape

111. As to whether the offence of rape was proved, we begin with looking at the definition of the word. Under Section 3(1) of the *Sexual Offences Act*:

> " A person commits the offence termed rape if;
>
> a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
>
> b. The other person does not consent to the penetration; or
>
> c. The consent is obtained by force or by means of threats or intimidation of any kind.

112. Penetration is defined aspartial or complete insertion of the genital organs of a person into the genital organs of another person under section 2 of the *Sexual Offences Act*.

113. The same section defines genital organs as the whole or part of male or female genital organs and for purposes of this Act includes the anus.

114. In the case of Charles Ndirangu Kibue vs. Republic [2016] eKLR the court stated that:-

> " The word rape is derived from the Latin term rapio, which mean 'to seize'. Thus rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman

without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will." In other words, rape is violation with violence of the private person of a woman. A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under the Section 43 cited above.

The sex must be against the will of the complainant. The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. The expression 'against her will' would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition. The essence of rape is the absence of consent. Consent means an intelligent, positive concurrence of the 'will' of the woman. The policy behind the exemption from liability in the case of consent is based on the principle that a man or a woman is the best judge of his or her own interest, and if he or she decides to suffer a harm voluntarily, he or she cannot complain of it when it comes about. Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific sexual act...

Consent may be either expressed or implied depending upon the nature and circumstances of the case. However, there is a difference between consent and submission. An act of helpless resignation in the face of inevitable compulsions is not consent in law.'

115. In this case, PW1 contends that the Appellant penetrated her anus. He told her to lie on her stomach after establishing that she was on her period and thereafter asked her if she was HIV positive. When she said she was not sure, he penetrated her anus using a condom. She did not consent to this act thus the elements of rape have been proven in this case. This amounted to rape whose ingredients are canal knowledge without consent of the complainant.

116. Section 2 of *Sexual Offences Act* defines genital organs – includes whole or part of male or female genital organs and for purposes of this Act incudes the anus.

Penetration means the partial of complete insertion of genital organs of a person into the genital organs of another person. Therefore, with the above mentioned definitions and the evidence on record the Appellant is found guilty for the offence of rape against PW.1

Alibi Defence

117. In this case the appellant's defence was that of alibi defence. In the case of *Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013* (UR) the Court held that:

> " an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged."

118. The Prosecution had to discharge the burden that the Appellant was at the scene. The Respondents were also not put on notice to investigate the defence of alibi further after it was raised at the tail of the proceedings. However, the theft and recovery of the mobile phone and the positive identification ID parade placed the Appellant at the scene of crime. The Court of Appeal in the case of Victor Mwendwa Mulinge v Republic [2014] eKLR opined as follows:

> " In KARANJA v REPUBLIC (Supra), this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested

by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought. In this case, we do not know whether the appellant in his statement to the police had stated that on the material day and time he was in a college class. This is an issue that ought to have been dealt with by the trial court but that court failed to discharge that duty. But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of Section 309 of the Criminal Procedure Code the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence"

119. As such, this defence of alibi was not established/proved and remained a mere allegation as it was raised at close of Defence case.

120. Accordingly, for the reasons set out above, the appellant's appeal from conviction is without merit and the same is dismissed.

Sentencing

121. As regards the sentence, this court is guided by Clause 1.2 of the Sentencing Guidelines (2023) which lay out the principles underpinning the sentencing process as follows:

i. Proportionality: The sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

ii. Equality/Uniformity/Parity/Consistency/Impartiality: The same sentences should be imposed for same offences committed by offenders in similar circumstances.

iii. Accountability/Transparency: The reasons behind the determination of sentence should be clearly set out and in accordance to the law and the sentencing principles laid out in these guidelines.

iv. Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.

v. Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behaviour as a whole.

vi. Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote and not undermine human rights and fundamental freedoms. Whilst upholding the dignity of both the offender (and where relevant, the victim), the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya. Sentencing impacts on crime control and has a direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.

vii. Enhancing Compliance with Domestic Laws and Recognized International and Regional Standards on Sentencing: Domestic law sets out the sentences that can be imposed for each offence. In addition, those international legal instruments, which have the force of law under Article 2 (6) of *the Constitution* of Kenya, should be applied. There are also international and regional standards and principles on sentencing that, even though not binding, provide important guidance on sentencing

122. The Appellant was sentenced to serve 20 years imprisonment for count one and 10 years for the second count. The sentences are to run consecutively.

123. This Court notes the Appellant was 1st offender.

124. Section 296(2) of the Penal Code provides that the sentence for robbery with violence is death sentence but the Trial Court sentenced him to 20 years which I find fair under the circumstances and in light of recent jurisprudence that the death penalty is no longer mandatory sentence.

125. The minimum sentence for the offence of rape is 10 years. This Court does not find any reason to interfere with the sentences save to direct that as the rape and the robbery with violence were committed as part of the same criminal transaction, the sentences shall be served concurrently taking into account section 333(2) of the Criminal Procedure Code taking into account the date of arrest arraignment in Court for plea and after grant of bond/bail if he stayed in custody during trial upto conviction, that period shall be counted as part of sentence of 20 years.

It is so ordered.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT ON 5/7/2024(VIRTUAL/ PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

Walter Moturi Nyakina – The Appellant

Ms Koech For The State

Patrick/geoffrey – Court Assistant(s)