



REPUBLIC OF KENYA



**Wabwile & 3 others v Republic (Criminal Appeal 123, 57, 48 & 55 of 2018  
(Consolidated)) [2024] KEHC 8367 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8367 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 123, 57, 48 & 55 OF 2018 (CONSOLIDATED)**

**DK KEMEL, J**

**JULY 5, 2024**

**BETWEEN**

**KELVIN WEKESA WABWILE ..... 1<sup>ST</sup> APPELLANT**  
**DAVID MAYUBA KISAKA ..... 2<sup>ND</sup> APPELLANT**  
**JOHN NYONGESA ..... 3<sup>RD</sup> APPELLANT**  
**THOMAS MASIKA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellants herein Kelvin Wekesa Wabwile, David Mayuba Kisaka, John Nyongesa and Thomas Masika were tried and convicted of the first and second count namely robbery with violence contrary to section 296(2) of the *Penal Code*. Further, Kelvin Wekesa Wabwile and Thomas Masika were found guilty and convicted for the fourth count of an offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2007.
2. Under Count I, the particulars of the offence were that Kelvin Wekesa Wabwile, David Mayuba Kisaka, John Nyongesa and Thomas Masika on 17<sup>th</sup> day of January 2015 at(Particulars withheld)Shopping Centre within Bungoma County jointly being armed with offensive weapons namely pangas and rungus robbed Levy Nyongesa Wanjala of Kshs. 5,000/= and at the time of such robbery, used actual violence against him.
3. Under Count II, the particulars of the offence were that Kelvin Wekesa Wabwile, David Mayuba Kisaka, John Nyongesa and Thomas Masika on 17<sup>th</sup> day of January 2015 at(Particulars withheld)Shopping Centre within Bungoma County jointly being armed with offensive weapons



- namely pangas, rungas and sticks robbed NMN of Kshs. 250/= and at the time of such robbery, used actual violence against her.
4. Under Count 111, the particulars of the offence were that Kelvin Wekesa Wabwile, Thomas Masika Wafula, John Nyongesa Wafula and David Mayuba Kisika on 17<sup>th</sup> day of January, 2015 at (Particulars withheld) Shopping Centre within Bungoma County, jointly with others not before court being armed with offensive weapons namely pangas and rungas robbed Donex Barasa Wanyonyi.
  5. Under Count IV, the particulars of the offence were that Kelvin Wekesa Wabwile and Thomas Masika on 17<sup>th</sup> day of January 2015 at (Particulars withheld) Shopping Centre within Bungoma County intentionally and unlawfully caused their penis to penetrate the vagina of FMT without her consent.
  6. The 4<sup>th</sup> Appellant herein Thomas Masika Wafula faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code in that on the 17<sup>th</sup> January, 2015 at around 6.30 AM at (Particulars withheld) shopping centre within Bungoma County, otherwise than in the course of stealing, dishonestly undertook the retention of one cell phone make Itel S/No.35358506115xxxx knowing or having reason to believe it to be stolen.
  7. Having been taken through full trial, they were convicted and sentenced as follows: under Count I-20 years' imprisonment each; under Count II-20 years' imprisonment each and under Count IV-1<sup>st</sup> and 4<sup>th</sup> Accused person -40 years' imprisonment. The sentences were ordered to run consecutively.
  8. On 13<sup>th</sup> October 2023, this Court consolidated the four criminal appeals namely Bungoma HCCRA 123 of 2018, HCCRA 57 of 2018, HCCRA 48 of 2018 and HCCRA 55 of 2018 and that all were to be canvassed under HCRA No. 123 of 2018.
  9. Being aggrieved by the convictions and sentences, the Appellants lodged the following grounds of appeal:
    - i. That the learned trial magistrate erred in law and fact by convicting the Appellants on evidence of identification by recognition when the circumstances and time could not allow positive identification and/or positive recognition.
    - ii. That the learned trial magistrate erred in law and fact by relying on false and contradictory evidence from the witnesses of the prosecution.
    - iii. That the prosecution failed to call upon all the mentioned witnesses as per the record to adduced their evidence.
  10. The case, as presented by the prosecution was that PW1, Francisca Mudeny Simiyu, who testified that on 17<sup>th</sup> January 2015, at around 3.30 am while at the Word of Grace Church on their way to (Particulars withheld) from Webuye attending their singing, suddenly power went out. Apparently, about ten people had cut the power at the church and gained access into the church. They bore torches. They ordered her and her colleagues to lie down demanding they hand over their phones and money. All of a sudden, someone cried out for help from outside the church and this prompted the intruders who were inside the church to leave and they took that opportunity to get away and seek shelter in an uncompleted building about five meters away. She testified that with the aid of illuminated electric lamps from the neighbouring Marina Resort, she was able to look back towards the church compound. She testified that she was able to see the 3<sup>rd</sup> Appellant, John Nyongesa and the 2<sup>nd</sup> Appellant, Davide Kisaka pulling Neilla through the fence.
  11. According to PW2, Levi Nyongesa Wanjala, he recalled that on 17<sup>th</sup> January 2015 at about 4.20 am while at Word of Grace Church offices praying and that the praise and worship practice was ongoing on



the main church, he heard screams and on peeping out to see what was happening in the main church, he noticed that it had been engulfed in darkness although earlier on there was lighting. He returned to his office and fetched a solar lamp then proceeded outside to investigate what was happening. He testified that he was able to see the more than five men dragging out young ladies from the church with the aid of the security lamp from the Marina Hotel next door. He testified that he was not very far from them and that he was able to identify one person who was known to him for about six years namely, the 1<sup>st</sup> Appellant, as he had previously been his pupil. He insisted that the 1<sup>st</sup> Appellant had on a Marvin and that his eyes were not visible but he clearly recognized his voice. The 1<sup>st</sup> Appellant informed his fellow intruders to let go of the girl they were holding, one Beverlyne, and that they struck him on the head and injured him. He lost consciousness and was hospitalized at Webuye District Hospital. He told the Court that he realized later that he had lost Kshs. 5,000/= from his wallet.

12. PW3, NMN , told the Court that on 17<sup>th</sup> January 2015 at 3.30 am while at Word of Grace Church at(Particulars withheld)attending a singing practice, there was a sudden power outage and that about five people or more male youths gained access into the church. They ordered everyone to lie down and they proceeded to demand money and phones from them. According to her, they had runkus and pangas. She got into an altercation with two of them and that one of them hit her on the head.. She lost her senses and when she became alert once again she found herself being dragged towards the outer door of the church towards a secluded area. One of the assailants kept on dragging down her by her trousers and she kept on pulling them back up. They took her towards the fence and she recognized the watchman of the adjoining property. The watchman shone his torch on the three and that by the strength of that light she was able to see the persons who were dragging her and that they were people well known to her namely, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. She told the Court that the 3<sup>rd</sup> Appellant is a person well known to her for a period of one year prior to the incident and that prior to the incident she knew the 3<sup>rd</sup> Appellant and recalled on the said date that he wore a purple jacket.
13. PW4, Zablon Wangila Makhanu, told the Court that he was working as a guard on the morning of 17<sup>th</sup> January 2015 at around 3.30 am at a property adjacent to the Word of Grace Church. He testified that he heard screams and when he crept to the fence, he saw the lights at the church were off. He saw two people dragging a woman near the fence and he used his whistle and shone the torch. This prompted them to run away and there was a security lamp shining from the neighbours hotel which enabled him to see their faces. He stated that they were people he knew and identified them as the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants herein. He added that the 3<sup>rd</sup> Appellant wore a purple jacket.
14. PW5, FMT , testified that at about 4.00 am on 17<sup>th</sup> January 2015 she was at the Word of Grace Church doing praise and worship practice when the lights went out and that a group of people gained access into the church bearing runkus and pangas. She testified that they demanded that they hand over their phones and money. They took her phone make ITEL and when they become distracted when they confronted PW2, she took advantage and ran off but was pursued by three attackers. She told the Court that one hit her on the head and she fell down. They then carried her and pulled her out of the church to an estimated distance of 15 kilometers. At the scene, they tore her underpants and while the other two used torches to shine and spectate as each of them took turns to penetrate her vagina using their penis. When the 3<sup>rd</sup> Appellant was about to have his turn, the police land cruiser passed by and they ran off. She stated that she got up and started walking towards the church where she was reunited with the other victims and taken to the hospital. On their way to the hospital, they came across two of her assailants and she alerted the company with her. They immediately summoned the police at Bukembe on phone. She stated that their vehicle which had passed the suspects turned back and one of the pedestrian suspects stopped it for a lift. One of the passengers alighted and allowed one of the suspects to get in but the other one sensed something was off and tried to take off but he was apprehended.



- The two were presented at Bukembe AP Camp before she was taken to Webuye District Hospital. She testified that she saw the faces of her assaulters during the rape ordeal by the light of the torch and that she recognized them as the pedestrians who were walking on the roadside. On cross examination by the 3<sup>rd</sup> Appellant, she stated that when the intruders attacked the church, they did not cover their faces.
15. PW6, No. 90085058 Sergeant Stephen Mitios, testified that on 17<sup>th</sup> January 2015, a report of an attack on a church was lodged. He later received the victims informing him that they had arrested two suspected assailants. He instructed the two suspects be brought to AP Camp Bukembe and that he searched the suspects and found a phone in the front pocket of 4<sup>th</sup> Appellant herein which was identified as exhibit 8 belonging to one Donex Barasa and which had been stolen in robbery incident.
  16. PW7, Philip Mboli, testified that on 17<sup>th</sup> January 2015 at 4.30 am he was asked to ferry victims of the robbery attack at the Word of Grace Church to the Webuye District Hospital. He proceeded to the church and picked up the victims. While at Matisi, a lady on board shouted “ndiyo hawa” and that prompted him to turn back as he had already passed them. He turned back and drove for some distance and stopped where the strangers were and who were promptly apprehended by the victims and those escorting them to hospital. That the two suspects were put in his vehicle and driven to Bukembe police post.
  17. PW8, Corporal George Kinyua testified that he was the investigating officer in the matter and that on 18<sup>th</sup> January 2015 he was informed by his superiors of a robbery with violence and gang rape incident. He stated that two suspects were already apprehended. He proceeded to the scene of the crime and recorded statements from the witnesses who implicated the four Appellants herein. He continued his investigations and after gathering sufficient evidence, he proceeded to charge the Appellants. He produced the recovered cell phone as exhibit 8.
  18. PW9, Elias Adoka, testified that he is a clinical officer from Bungoma Referral Hospital and that he was the one who filled the P3 form for PW2 on 25<sup>th</sup> March 2015. According to him, PW2 was presented at the hospital with a history of assault on 17<sup>th</sup> January 2015 and that on examination he noted a large cut wound to the posterior of the right cheekbone. He estimated the injuries to have been inflicted by a sharp object and classified the same as grievous harm. He adduced PW2’s initial treatment notes as Exhibit 1 that show the witness was admitted to Webuye District Hospital and discharged on 23<sup>rd</sup> January 2015.
  19. He also produced the P3 form on behalf of Doctor Kosgei who had carried out the examination of PW5 on 22<sup>nd</sup> January 2015 following a complaint of rape. He observed that the complainant was bleeding from the injuries in her private parts and that the doctor opined that the complainant was indeed raped. He estimated the age of the injuries to be four days taking them to the date of the complaint.
  20. He produced the P3 form of PW3 on behalf of Doctor Kosgei who had carried out the examination on the complainant on 22<sup>nd</sup> January 2015. According to the doctor, the patient was presented with a history of assault and upon examination, the doctor found four days old injuries to the head taking them to the date of the injury. (see exhibit 6).
  21. PW10, Beverlyne Wanyonyi, testified that on 17<sup>th</sup> January 2015 at about 4.00 am she was at the Word of Grace Church for praise and worship practice when the lights went off and that many people armed with pangas attacked them. The attackers ordered them to lie down and remove their phones and money. She stated that she recognized one of the attackers near her and that she lost her Kshs. 500/= . The attackers dragged her out of the church and that was when she saw the person holding her was 3<sup>rd</sup> Appellant. She testified that she knew the Appellant prior to the incident and in the confusion she was



able to run away. She added that as she ran away, she came across the watchman who assisted her and brought her back to the church where they were taken to the hospital.

22. Upon being put on their defence, the 1<sup>st</sup> Appellant in a sworn statement averred that on the morning of 22<sup>nd</sup> January 2015 at 5.00 am to be precise, he woke up to go to work and walked up to Misanga when a vehicle came from behind him. He stopped the said vehicle and indicated that he wanted to go to Webuye. He noted that the vehicle had passengers inside and the driver and went ahead about a kilometer and picked another passenger only for him to turn and come back to where he was and stop. All the passengers alighted and he was told to get into the vehicle and was taken to CID and charged with these offences.
23. The 2<sup>nd</sup> Appellant gave an unsworn evidence stating that on 17<sup>th</sup> January 2015, he spent the whole day in the fields with his nephews and that he retired to bed at about 8.30 pm. The next day he learnt of the attack on PW1's home. He stated that PW2 is a neighbour and that together with his wife they visited him to commiserate with the family of PW2.
24. The 3<sup>rd</sup> Appellant gave an unsworn evidence stating that on 17<sup>th</sup> January 2015, at about 6.00 pm he was involved in a road traffic accident and when he went to report the same he was detained as he did not have his national identity card. He insisted the charges he faced were false.
25. The 4<sup>th</sup> Appellant gave an unsworn evidence stating that on 17<sup>th</sup> January 2015, he was coming from his rental home at Matisi and wanted to go to Webuye. It was early morning. He stopped a vehicle and sat next to the driver at the front seat. The driver's phone rang and the driver stated that he had a customer who was behind and that the vehicle turned around and went to a built area where he was asked to produce his identity card and on production he was arrested and was implicated in a murder and was charged with these charges.
26. The appeal was canvassed by way of written submissions. All parties filed and exchanged their respective submissions.
27. This being the first appellate court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate Court must give allowance over the same. This was well put in the well-known case of *Okeno V. Republic* [1972] EA 32 where the court stated as follows:

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

### **Offence of robbery with violence.**

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

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

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



- ii. The offender is in company with one or more person or persons; or
- iii. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

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

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

30. According to the evidence adduced, PW1 testified that about 10 people cut the power at the church and gained access into the church. They bore torches. They ordered her and her colleagues to lie down demanding that they hand over their phones and money. All of a sudden someone cried out for help from outside the church and this prompted the intruders who were inside the church to leave and they took that opportunity to get away and seek shelter in an uncompleted building about five meters away. She testified that with the aid of illuminated electric lamps from the neighbouring Marina Resort, she was able to look back towards the church compound. She testified that she was able to see the 3<sup>rd</sup> Appellant, John Nyongesa and the 2<sup>nd</sup> Appellant, Davide Kisaka pulling Neilla through the fence. PW2, Levi Nyongesa Wanjala, he recalled that on 17<sup>th</sup> January 2015 at about 4.20 am while at Word of Grace Church offices praying and the praise and worship practice ongoing on the main church, he heard screams and on peeping out to see what was happening in the main church, he noticed it had been engulfed in darkness although earlier on there was light. He returned to his office and fetched a solar lamp then proceeded outside to investigate what was happening. He testified that he was able to see more than five men dragging out young ladies from the church with the aid of the security lamp from the Marina Hotel next door. He testified that he was not very far from them and that he was able to identify one person who was known to him for about six years, the 1<sup>st</sup> Appellant, as he was previously his pupil. He insisted that the 1<sup>st</sup> Appellant had on mavin and that his eyes were not visible but he clearly recognized his voice. The 1<sup>st</sup> Appellant informed his fellow intruders to let go of the girl they were holding, one Beverlyne, and that they struck him on the head and injured him. He lost consciousness and was hospitalized at Webuye District Hospital. He stated that he realized later that he had lost Kshs. 5,000/= from his wallet. PW3, NMN, told the Court that on 17<sup>th</sup> January 2015 at 3.30 am while at Word of Grace Church at Bukembe attending a singing practice there was a sudden power outage and about five people or more male youths gained access into the church. They ordered everyone to lie down and who proceeded to demand money and phones from them. According to her, they had rungas and pangas. She got into an altercation with two of them and one of them hit her on the head.. She lost her senses and when she became alert once again she found herself being dragged towards the outer door of the church towards a secluded area. One of the assailants kept on dragging down her by her trousers and she kept on pulling them back up. They took her towards the fence and she recognized the watchman of the adjoining property. The watchman shone his torch on the three by the strength of that light she was able to see the persons who were dragging her and that they were people well known to her namely, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. She testified that the 3<sup>rd</sup> Appellant is a person well known to her for a period of one year prior to the incident and that prior to the incident she knew the 3<sup>rd</sup> Appellant and recalled on the said date that he wore a purple jacket. PW10, Beverlyne Wanyonyi, testified that on 17<sup>th</sup> January 2015 at about 4.00 am she was at the Word of Grace Church for praise and worship practice when the light went out and many people armed with pangas attacked them. The attackers ordered them to lie down and remove their phones and money. She testified that



she recognized one of the attackers near her and that she lost her Kshs. 500/=. The attackers dragged her out of the church and that was when she saw the person holding her was the 3<sup>rd</sup> Appellant. She added that she knew the Appellant prior to the incident and in the confusion, she was able to run away. She further stated that as she ran away, she came across the watchman who assisted her and brought her back to the church where they were taken to the hospital.

31. From the foregoing, it is clear that the ingredients of the offence were rightfully proven as the offenders were armed with dangerous and offensive weapons which included clubs (rungus) and pangas and that the offenders were in the company of one or more persons, and that physical violence and threats were occasioned.

1. The question of identification of the Appellants may be answered with reference to the setting of the evidence of PW1, PW2, PW3, PW5 and PW10 regarding the recognition of the Appellants. Further, PW2 was able to corroborate the evidence of PW5 as he recognized one of the Appellants, to be precise the 1<sup>st</sup> Appellant, as he was once his teacher while PW2 recognized his voice. PW5 testified that she was able to recognize the 1<sup>st</sup> Appellant when her assailants shone a torch light on their faces as they gang raped her. According to PW5, the attackers never covered up their faces during the attack but the other witnesses to be precise PW1, PW2, PW3 and PW10 testified that during the instant moments of the robbery, the Appellants tried to cover up their faces. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were positively identified by the victims and those who came to their rescue. PW5 was also able to identify the 4<sup>th</sup> Appellant as one of her assaulters and this was supported by the circumstantial evidence in the form of exhibit 8 which was recovered from him. PW6 testified that he recovered the exhibit 8, Phone itel S/NO. 353585061153105 the subject of the complaint under count III from the 4<sup>th</sup> Appellant herein. No explanation was given on how the 4<sup>th</sup> Appellant came to be in possession of the phone during their defence and therefore the doctrine of recent possession has been proved against them. The doctrine of recent possession entitles this court to infer guilt where the accused is found in possession of recently stolen property in unexplained circumstances. Indeed, the recovery was made just after the robbery incident when the victims were being rushed to hospital and hence, the item could not have changed hands that soon as it was still night time (3.30 AM -4.30 AM). The Court of Appeal summarized the essential elements of the doctrine of recent possession in the case of Eric Otieno Arum v Republic (2006) eKLR, where it was held;

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of 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.”

32. It is indeed not a coincidence that an item stolen was found in the possession of an individual in close proximity to the 1<sup>st</sup> Appellant herein who was identified respectively by PW2 as one of the attackers who robbed members of the Word of Grace Church on 17<sup>th</sup> January 2015. PW1, PW3, was able to mention the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants while PW3 was able to mention the name of the 3<sup>rd</sup> Appellant herein. In this case, it is elaborate that there can be no question as to the identification by the weightier evidence of recognition of the Appellants because the identification was not done in any



difficult circumstances, PW1 and PW3 having known the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants by their respective names; PW2 having recognized the 1<sup>st</sup> Appellant via his voice as he was once his teacher; PW5 having recognized the 1<sup>st</sup> and 4<sup>th</sup> Appellants as the assailants who gang raped her during the ordeal with the aid of the light of the torch used to shine the light on themselves during the ordeal and PW10 knowing the 3<sup>rd</sup> Appellant by his name.

33. This does place the court in a position to deliberate on whether the evidence of PW1, PW2, PW3, PW5 and PW10 was sufficient enough to warrant a conviction by the trial court. The law is settled that where the only evidence against an accused is that of identification/recognition, the court must scrutinize that evidence with great care and be satisfied that there was no possibility of error. In *Wamunga v Republic* [1989] KLR 426, the Court of Appeal stated:

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

34. Similarly, the same court held in *Nzaro v Republic* [1991] KAR 212 that evidence of identification or recognition at night must be absolutely watertight to justify a conviction. (See also *Kiarie v Republic* [1984] KLR 739).

35. The above principles were established in *R v Turnbull & Others* (1976) 3 ALL ER 549, where the court laid down the factors that ought to be considered when the only evidence turns on identification by a single witness, thus:

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

36. There can be a safe recognition even at night and the Court of Appeal stated as much in *Douglas Muthanwa Ntoribi v Republic* [2014] eKLR while upholding evidence of recognition at night that:

“The learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error.”

37. In *Peter Okee Omukaga & Another v Republic* [2011] eKLR the Court of Appeal stated on the evidence of recognition at night:

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours’



from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

38. PW1, PW2, PW3, PW5 and PW10 gave concise account of the events of the robbery. Some of them recognized the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants by their names while that of the evidence of PW5 was identification by recognition from the earlier sexual assault on her by the 1<sup>st</sup> and 4<sup>th</sup> Appellants. It was the evidence of the Appellants that the charges against them are false. They claimed to have been arrested because they walked around at night and that some of them did not have their respective national identification cards. They claimed that at time of the incident, they were all nowhere in Bukembe Shopping Centre. All the Appellants did not provide sufficient evidence to cast doubt on the evidence tendered in by the Prosecution.
39. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable and assuring than the identification of a stranger (see *Anjononi & Others v Republic* [1980] KLR 59).
40. The Appellants defence is in the nature of an alibi. The law is settled that an accused person who raises the defence of alibi does not assume the burden of proving it. It is sufficient if the alibi raises a reasonable doubt as to whether or not the accused was at the scene of the crime (see *Kiarie v Republic* [1984] KLR 739). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. The Appellants did not give notice of their alibi in order for the Prosecution to call evidence in rebuttal. In such a case, the duty of the Court is to consider the alibi alongside the Prosecution’s case and in doing so i find the Appellants’ defence to be mere moonshine and i reject it in light of the clear evidence by PW1, PW2, PW3, PW5, PW8 and PW10 placing them at the scene of the incident.
41. I therefore affirm the conviction. Although it was at night, I am satisfied that PW1, PW2, PW3, PW3 and PW10 were able to recognize the Appellants and that they were able to corroborate each other’s evidence thus there was no likelihood of error. I am unable to fault the trial Court on this finding of fact and the subsequent conviction on the offences of robbery with violence contrary to section 296 (2) of the *Penal Code*.

### **Offence of Gang Rape**

42. On the offence of gang rape, the medical evidence of PW9 showed that PW5 was penetrated as there were “lacerations on both labias and vaginal walls with presence of bleeding.” No consent could have been given in view of the injuries occasioned on PW5, and that consent as a defence was not raised. PW9 produced in Court PW5’s initial treatment notes and P3 form (exhibit 7b).
43. The medical evidence proving penetration of PW5 without consent (lack of which is an ingredient in the offence of rape under the *Sexual Offences Act*) having regard to the use force and injuries occasioned on PW5 has been established by medical evidence.
44. For the reasons set out above, this Court finds that the Respondent proved its case against the Appellants on both the offence of robbery with violence contrary to section 296(2) of the *Penal Code*



and rape contrary to section 10 of *Sexual Offences Act*, having established the necessary ingredients for each offence to the required standard of proof of beyond reasonable doubt.

45. On the aspect of identification of the 1<sup>st</sup> and 4<sup>th</sup> Appellant, I already found that the same was safe and that the evidence of PW9 estimated the injuries of PW5 to be four days as at the date of examination which was 22nd January 2015 indicting that the date of her sexual assault was truly 17<sup>th</sup> January 2015. The evidence as tendered by PW9 corroborated that of PW5 that she was sexually assaulted by the 1<sup>st</sup> and 4<sup>th</sup> Appellants on that fateful day.

46. The general rule as regards the effect the discrepancies in the evidence of witnesses have in discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling, substantial or deliberate. See Law of Evidence (10th Ed) Vol. 1 at 46. As was noted in *Twebangane Alfred vs. Uganda*, Crim App. No. 139 of 2001, [2003] UGCA, 6:

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

In *Joseph Maina Mwangi vs. Republic* CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

47. Where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of the events, which are mere discrepancies that would not be available to the accused persons as a defence, because some of such discrepancies are expected as being natural (*The State vs. Sunday Dio Dogo (Alias Sunday Idogo)* HSO/3C/2012, Oboh J in the High Court of Nigeria). It was therefore held in *Njuki vs. Rep* 2002 1 KLR 77, that:

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.

48. The manner of dealing with discrepancies and inconsistencies was stated in *Dickson Elia Nsamba Shapwata & Another vs. The Republic*, Cr. App. No. 92 of 2007 where the Court of Appeal of Tanzania concluded that:

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

49. With regard to the prosecution not summoning vital witnesses for their case, this Court notes that PW6 recovered exhibit 8 from the 4<sup>th</sup> Appellant and that was the core basis of count III. As the trial Court noted in its erudite judgement, the said phone belonged to one Donnex Barasa Wanyonyi and



who was never called to testify as he could not be traced and brought to trial and on investigation it was established that he had already died. Consequently, it cannot be stated that due to failure to prove propriety interest, the Respondent was not capable of proving the existence of the item capable of being stolen. In any event, the 4<sup>th</sup> appellant did not lay a stake to the recovered cell phone as his so as to cast doubt upon the evidence of the Respondent. The recovered phone linked all the Appellants to the crime.

### **Excessive Sentence**

50. The punishment for robbery with violence is provided for in section 296(2) of the *Penal Code* that provides that in case of a conviction the offender shall be sentenced to death. However, as regards the sentence, the Supreme Court decision in *Francis Karioko Muruatetu & Anor. v. R.*, [2017] eKLR has found that the mandatory nature of death sentence is unconstitutional. The trial Court in this matter sentenced all the Appellants to serve 20 years imprisonment for this offence under Count I and II. This Court finds a sentence of imprisonment for Twenty (20) years is appropriate enough to meet the justice of the case with respect to retribution, rehabilitation and deterrence.
51. Section 10 of the *Sexual Offences Act* states as follows;
- “A person guilty of an offence under this section is liable upon conviction to imprisonment for a term not less than fifteen years but which may be enhanced to imprisonment for life.”
- The trial Court sentenced the 1<sup>st</sup> and 4<sup>th</sup> Appellant to serve Forty (40) years imprisonment. Sentencing is the discretion of the trial Court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.
52. In the case of *Wanjema vs. Republic* (1971) E.A. 493 the Court stated as follows; “An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”
53. This Court does not find any reason to interfere with the sentences imposed by the trial court meted as the same is lawful. Further, the victim of the gang rape was taken through a horrendous ordeal of being assaulted physically and then raped by the appellants in turns. Obviously, the victim suffered psychological torture and will continue to suffer for the rest of her life. As the sentence of fifteen years can be enhanced to life imprisonment, then the sentence of forty (40) years’ imprisonment passed by the trial court is perfectly within the law.
54. Finally, it is noted that the trial court ordered that the sentences do run consecutively. Whereas it is perfectly in order to order sentences to run consecutively where the incidences took place at the same time, it is resorted to in the most extreme cases. Already some of the Appellants have been ordered to serve more than one sentence. Looking at the duration of the sentences, I find that the circumstances warrant an order that they run concurrently. It is instructive that the Appellants are first offenders.
55. In the result, and save only to the extent that the sentences shall run concurrently and do commence from the date of arrest namely 17.1.2015, the appeal herein lacks in merit and is hereby dismissed.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 5<sup>TH</sup> DAY OF JULY 2024.**

**D. KEMEI**



**JUDGE**

In the presence of:

Kelvin Wekesa Wabwile 1<sup>st</sup> Appellant

.....2<sup>nd</sup> Appellant

.....3<sup>rd</sup> Appellant

.....4<sup>th</sup> Appellant

.....for Respondent

..... Court Assistant

