REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 90 OF 2017

LEONARD KIMUTAI OLEKIPAI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

1. Robbery with violence when combined with Rape, are perhaps the most horrific combination of crime that can happen to any woman or girl, and sometimes to men and boys. The perpetrators take away, forcefully, not only the earthly possessions of the victims, i.e. what the victims have, but more significantly, something of the personal person of the victim, of who the victim is, leaving behind physical, emotional and psychological trauma. In our world where the requisite systemic psychosocial support is, as the Swahili would put it '*nadra'*, meaning rare, the victim is left to live out a life of trauma and fear and to survive it on their own. The trial court and the appeal court are confronted with the delicate task of considering and applying the facts to the law while at the same time dealing with the effect of the case on their own selves. Courts are human too, but, called to stand above emotion and feelings to apply the law to the facts.

2. On the night of 17th March, 2014 EMK was in her house with MGR her 17 year old niece, her 5 year old daughter and JEA 21 year old house help. They ate and slept. EMK slept with the baby in her room, her niece and house girl in another.

3. Around 12.00 a.m. her niece knocked on her door telling her that the baby was sick. She knew the baby was not sick, because the baby was right there with her, she obviously became suspicious. When she opened the bedroom door there was a flood of light, from two very bright torches not held by her niece. She ducked the light and saw that there were three people behind her niece. She was ordered back into the room, and so was her niece.

4. How had her niece got there? She too had been sleeping when she felt something/someone tap her back. She thought it was the JEA with whom they shared the bed asking to use her phone as usual. She placed the phone beneath the pillow where JEA could get it. But someone was still telling her to wake up. She woke up to be met by the sight of JEA with her hands up and a panga placed on her shoulder. The person who ordered her to wake up pointed a gun at her and told her to switch on the lights, which she did. It is this gun bearer, she identified as the Appellant. His face and that of his colleagues were not covered.

5. MGR was asked who else was at home, and she said that it was her aunt. She was given instructions to go and wake her up and to tell her that the baby was sick. She went EMK's room and followed the instructions.

6. When her aunt EMK opened the door, JEA was escorted into the room. The robbers ordered her to put on the lights which she did. There were three men who were armed with a gun, a panga, a big scissors(pliers). They began ransacking the house, and they demanded her ATMs. EMK gave them her ATMs for Equity and KCB bank ATM cards. The robber who was armed with the panga demanded for the ATM Pin numbers and when she could not recall them he slapped her. He demanded for her phones, which she surrendered. He also took her laptop.

7. The robber who was wielding the gun kept brandishing it at them and at some point made a show of removing all the bullets and returning them back into the gun. EMK, JEA and MGR had ample time to notice that he was wearing an orange coloured trouser.

8. After the robbers were done ransacking the house they covered their faces, one used JEA's skirt to cover his face. The robbers then ordered the three ladies to lie down, which they did. The three were tied them up with some cable which panga wielding one cut from somewhere.

9. After all this the robber wielding the gun took MGR from the room. He escorted her to the toilet and ordered her to urinate. She did as she was ordered. Then he took her to the room next to EMK's room. He told her he was going to have sex with her. She refused. He told her if she refused he was going to do it to her four (4) year old sister instead. He pushed her to the bed and ordered her to lie down properly then

he removed his trouser and remained in his T-shirt. He defiled her, while beating her at the same time.

10. When he was done, one of the other two whom she described as bow legged came into the room. He held the gun for the other robber while also assisting him to hold her legs because she was struggling and resisting. The two threatened her they would insert a bottle into her vagina if she continued resisting. She was screaming and crying and EMK and JEA could hear from the other room where they were tied down and were being watched by the 3rd robber. These two raped her in turns, and when they saw that she was bleeding, they made her wipe herself with a bed sheet, forced her to take a shower, and then escorted her back to EMK's bedroom.

11. When they got to EMK's bedroom the 3rd robber took her to the toilet and ordered her to bend over. When she refused he pushed her to the floor where he raped her. He then ordered her to wash herself, then escorted her to EMK's bedroom where he made to sleep on the bed with the baby. That is when she passed out

12. In her testimony JEA confirmed that when the robbers woke them up they made MGR put on the lights. The robber armed with the gun, and the other took MGR away leaving her with the one armed with the panga. She began to hyperventilate. When she asked for water, the panga wielding robber brought her the same to drink. He then took her to EMK's bedroom where she witnessed the robbers demanding EMK's ATM cards, phones, money.

13. When the other two took MGR away, the robber who was armed with the big scissors removed JEA's clothes, pinched her buttocks, while hitting her legs and head, ordering her to put her head down. She told him she was sick and even took some medicine. He however proceeded to open her legs, he saw she had a discharge. He called EMK asked her whether she, JEA was sick. EMK responded in the affirmative. He left her JEA alone and took EMK out.

14. EMK confirmed hearing the robber's voice asking, *"Mgonjwa wapi?"*

15. She testified that it was the appellant who came and took her to the same bedroom where JEA was. She found JEA completely naked. She was there when JEA was ordered to open her legs. The appellant was touching and showing her JEA's vagina while asking her whether JEA was sick. She confirmed that she answered in the affirmative. The robbers then told JEA to dress and go back to her room.

16. It was then that they ordered her EMK to lie where JEA had been lying. They then ordered her to get onto one of the beds. She noticed one of the robbers had rickets legs but the appellant was in an orange-ish jeans trouser. They ordered her to remove her clothes. She obeyed. One of the robbers lay on top of her but she crossed her legs tightly. The gunman gave him the gun, and he threatened to shoot her. She gave up struggling. Two of them, one of whom she described as tall, raped her in turns, leaving their sperms all over the bed. When they were done they ordered her to go and shower. She went into the shower, but did not wash off her private parts. They sent her to the bedroom.

17. In the bedroom they tied them up and left them. While in the bedroom tied up they could hear the watchmen screaming for help. MGR was able to untie herself, she untied JEA who in turn went and cut the ropes that had been tied to the watchman. EMK then called her Bishop and a Pastor who came to be with them. The police came later. She and MGR were taken to hospital where they were treated.

18. The robbers had stayed in the house for over three hours, and they were mostly not covered.

19. Two (2) weeks later the complainants were called to the police station where an identification parade was conducted. They were able to identify the appellant as the robber who was wielding the gun on the material night and the one who led the raping and defilement, he was the one who took a shower after the rape and defilement, and the one who made his rape victims to take a shower.

20. PW6 No. 77473 Cpl James Omollo was the investigating officer. His testimony was that a report of robbery at Nakuru Blankets was received at the station in the early hours of 18th March 2014. He visited the scene and confirmed that the gangsters had entered the house after cutting metal the door. He learnt that they were armed with weapons, gun, panga and big scissors, and that apart from stealing household items, phones, money, ATM cards, they had also gang raped 2(two) of their victims and assaulted the 3rd one. At the scene the police found and recovered blood stained sheets blood stained mattress cover, blood stained dress and pants, and the cable used to tie the victims. He also made a list of the items that were stolen.

21. Nothing of the stolen items was ever recovered.

22.The appellant was arrested on 3rd April 2014 and upon his identification, he was charged. It is PW4 who conducted the identification parade, while PW6 produced the medical reports for the 2 victims.

23. The following charges were brought against the appellant;

COUNT I

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296(2) OF THE PENAL CODE

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th day of March 2014 at [particulars withheld] within Nakuru County, jointly with others not before court while armed with dangerous weapons namely pistols robbed EDITH MUGUTE KABI items as per attached list all valued at Kshs. 242,595/= and at or immediately before or immediately after the time of such robbery used actual violence to the said EMK

COUNT II

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296(2) OF THE PENAL CODE

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th day of March 2014 at [particulars withheld] within Nakuru County, jointly with others not before court while armed with dangerous weapons namely pistols robbed MGR of one Itel Phone valued at Kshs. 3,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MGR

COUNT III

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296(2) OF THE PENAL CODE

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th day of March 2014 at [particulars withheld] within Nakuru County, jointly with others not before court while armed with dangerous weapons namely pistols robbed JEA of one Itel phone valued at Kshs. 2,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said JEA.

COUNT IV

GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th March 2014 at [particulars withheld] area within Nakuru County in association with others not before court, intentionally and unlawfully committed an act by inserting your male organ namely penis into the female genital organ namely vagina of EMK an adult aged 49 years.

ALTERNATIVE CHARGE (FOR COUNT IV)

INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(a) OF SEXUAL OFFENCE ACT NO. 3 OF 2006

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th March 2014 at [particulars withheld] area within Nakuru County in association with others not before court intentionally and unlawfully committed an indecent act by touching the private parts namely vagina of EMK an adult aged 49 years.

COUNT V

GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th March 2014 at [particulars withheld] area within Nakuru County in association with others not before court, intentionally and unlawfully committed an act by inserting your male organ namely penis into the female genital organ namely vagina of MGR a child aged 17 years.

ALTERNATIVE CHARGE (FOR COUNT V)

INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(a) OF SEXUAL OFFENCE ACT NO. 3 OF 2006

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th March 2014 at [particulars withheld] area within Nakuru County in association with others not before court intentionally and unlawfully committed an indecent act by touching the private parts namely vagina of MGR an child aged 17 years.

ALTERNATIVE CHARGE (FOR COUNT V)

INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(a) OF SEXUAL OFFENCE ACT NO. 3 OF 2006

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th March 2014 at [particulars withheld] area within Nakuru County in association with others not before court intentionally and unlawfully committed an indecent act by touching the private parts namely vagina of MGR an adult aged 17 years.

COUNT VI

INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(1) (a) OF SEXUAL OFFENCE ACT NO. 3 OF 2006

LEONARD KIMUTAI OLE KIPAI "ALIAS" LENNY: On the 18th March 2014 at [particulars withheld] area within Nakuru County in association with others not before court intentionally and unlawfully committed an indecent act by touching her private parts namely vagina of EA n adult aged 21 years.

LIST OF STOLEN ITEMS

S/NO.	***QUANTITY***	***ITEMS(S)***	***KSHS.***
1	*2*	*SONY CAMERAS*	*26,000/=*
2	*1*	*HP 630 LAPTOP*	*39,000/=*
3	*3*	*SUITCASES*	*12,500/=*
4	*1*	*VACUUM CLEANER*	*15,000/=*
5	*2*	*SONY HOME THEATRES*	*30,000/=*
6	*1*	*SONY VIDEO PLAYER*	*15,000/=*
7	*2*	*ENERGIZER RECHARGEABLE LAMPS*	*7,000/=*
8	*2*	*TOTAL 13KG GAS CYLINDERS*	*16,000/=*
9	*2*	*LIGHT SHADES*	*5,000/=*
10	*1*	*BLENDER*	*4,000/=*
11	*2*	*DUVET BLANKETS*	*7,000/=*
12	*1*	*LG JUICER*	*5,000/=*
13	*1*	*MICROWAVE*	*6,895/=*
14	*2*	*PHILIPS IRON BOXES*	*3,000/=*
15	*1*	*BLACK LEATHER PURSE*	*2,500/=*
16		*ASSORTED EARINGS & BANGLES*	*3,000/=*
17	*1*	*LADY BILLIONARE PERFUME*	*1,200/=*
18	*1*	*SAMSUNG 2232 PHONE*	*4,500/=*
19	*1*	*ITEL PHONE*	*5,000/=*
20	*1*	*DINNING TABLE CLOTH AND FLOWERS*	*6,000/=*
21		*AMOUNT IN CASH*	*30,000/=*
TOTAL VALUE			*242.595/=*

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24. When the prosecution closed its case, the appellant was found to have a case to answer and put on his defence. He told the court that he was not ready to proceed as he had appealed against the trial court's ruling.

25. The trial court formed the opinion that the appellant had by that statement refused to tender his defence and directed him to close his defence. Without any record as to whether the appellant had closed his defence trial magistrate proceeded to give a judgment date.

26. By a judgment delivered on 3rd November 2017, the learned trial magistrate found him guilty of all the six (6) counts and sentenced him as follows;

"Count I - He will suffer death

Count II - He will suffer death

Count III - He will suffer death

Count IV - He will serve life imprisonment

Count V - He will suffer life imprisonment

Count VI - He will serve 5 years imprisonment

Sentences for Count II, III, IV, V and VI will be held in abeyance. Sentence in Count 1 to be executed.

HON. B. MARARO

PRINCIPAL MAGISTRATE

14 days Right of Appeal

HON. B. MARARO

PRINCIPAL MAGISTRATE

3/11/2017"

27. The appellant filed this appeal.

28. When the appeal came for hearing on 14th October 2020, the appellant told the court he was relying on his submissions. The same had been served on the prosecution, but had not reached the court. I allowed the parties to proceed on the basis that the submissions would be sent to court for purposes of writing judgment. They were later received.

29. It is with these submissions that he appellant had filed the Amended Grounds of Appeal;

1. *THAT the learned trial magistrate erred in law and fact by failing to find that the charge as drawn was defective since it was duplicitous.*

2. THAT the learned trial magistrate erred in law and fact by failing to find that the appellant's identification was not positive.

3. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the appellant's right to a fair trial was violated.

4. THAT the learned trial magistrate erred in law and fact by sentencing the appellant to a mandatory sentence as provided by the statute whereby the mandatory nature of the death sentence was declared unconstitutional.

30. The appellant argued four grounds;

1) **That the charge was totally defective for being duplex**. He relied on; *Ibrahim Mathenge vs Republic Cr. Appeal No. 222 of 2014, Joseph Mwasura Njuguna & 2 Others vs Republic [2013]* eKLR**,** *Joseph Onyango Owuor & Cliff Ochieng Oduor vs Republic [2010] eKLR***,** *Criminal Appeal No. 353 of 2008***,** *Simon Materu Munialu vs Republic [2007] eKLR (Criminal Appeal No. 302 of 2005).*

31. The gist of these cases was captured in **Joseph Mwaura Njuguna & 2 Others vs Republic** where the Court of Appeal said;

"The offence of robbery with violence is totally different from the offence under Section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge."(Emphasis added)

2) **Identification**

The appellant relying on **Siaya HCR C Stephen Owino Opere vs Republic** argued that he was not identified: He submitted;

"My lady, I submit that the offence herein was alleged to have been committed on the night of 18th March 2014. However, the appellant's identification was not properly established. PW1 stated of the lighting as per page 13 lines 1-2 that;

"…… The lights were on all this time… I recognized one of them who is before court. He was looking like my late cousin."*PW2 further says of the appellant as per page 13 line 29 of the typed proceedings;*

"….the accused had worn a unique jeans tight orangeish"

PW2 *also told the trial court as per page 16 lines 24-25 of the typed proceedings that;*

"I was staring at him and he told me not to stare at him. He had an orange jean with patches. When they were doing a search the lights were still on."

PW3 *who was also present in the house during the robbery does not state in her evidence what sort of clothing the appellant was wearing.*

Upon the arrest of the appellant, ***PW1, PW2*** *and PW3 were called to attend an identification parade. PW1 says of the parade as per page 14 lines 26 – 28 over to page 15 lines 1 – 4 that;-*

"We were called by the police officer after two weeks to identify the assailants. It was at Nakuru Central Police Station. We did the identification parade. There were nine (9) men of body stature same and height plus their looks identical. I identified the 5th person who had worn the same jeans trouser that he had worn that night. <u>His complex... His accent was Kalenjin language and his looks</u>. They had stayed with us for three (3) hours and I could clearly identify them very well. The accused was one of them. I did identify him positively." *(Emphasis added)*

PW2 *also deposed in court as per page 18 lines 9 – 12 of the typed proceedings that;*

"…. We were to do the ID parade. I did identify the accused who was No. 6. I did positively recognize him. He had worn the same trouser jeans 1 orangeish ragged with patches brown checked."

It was further the evidence of ***PW3*** *as per page 20 lines 16 – 19 of the typed record of proceedings that;*

"We were called at the police station afterwards and we did the ID parade separately. I did recognize the accused and positively identified him. He was wearing the orangeish trouser and I did recognize his physical being."

32. He argued that the witnesses testified as to his unique orangeish trouser, to a Kalenjin accent, to his complexion, to his resembling the late cousin of PW1.

33. However that there was no point in which he/or the other identification parade attendant were asked to speak, that there was no prior description of his complexion or colour of his trouser, that the orange trouser was not unique as it was a piece of cloth that one could get easily in the market. He relied on the case of **<u>Stephen Owino Opere vs Republic [2016]eKLR</u>** where the court held:

"The critical issue for my consideration is whether PW1, PW6, PW7 and PW8 were able to identify the appellant. PW1 in the instant case did not make first report to Bumala Police Station or any station or other person stating what it was that enabled her identify the appellant. PW1 did not state what time she reached at her gate and what time it was when she saw the boy in green T-shirt with white stripes, how long was he under her observation and from what distance and in what light and whether the observation was free from any impediment. PW1 did not state whether she had even seen the boy before. It is clear from her evidence the boy was a total stranger to her. She gave the reason for remembering him as he was in a green T-shirt with white stripes but such shirts are commonly available in the as commodity of trade. She did not give any mark that would enable her pick the boy in such a dress. That the arrest of the appellant was after an hour and quite a long distance from the scene of the incident. The complainant was not at the scene at the time of the arrest of the appellant and had lost sight of the boy she had seen he left in a speeding car before."

34. He submitted the identification parade rules provided by **section 6(iv) (h) (i) and (l) of chapter 46**, Force standing orders which provides;

"6. (iv) Whenever or it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail-

(h) if the witness desires to see the accused/suspected person walk, hear him speak, see him with his hat on or off, this should be done, but in – this event the whole parade should be asked to do likewise;

(i) Ensure that the witness actually touches he person he identifies(l) A careful note must be made after each witness leaves the parade, to record whether he identified the accused/suspected person and in what circumstances."

35. That none of the prosecution witnesses actually touched him for identification. That he never signed the parade form. Relying on **<u>Terekali & Others vs Republic</u> (1952) EA 259** he argued that contrary to the holding in that case requiring that the complainants give a description of the culprits in their OB report, to aid identification, there was no such description in this case.

> **"Evidence of the first report by the complainant to a person in authority is important as it often provides good test by which the truth and the accuracy of the consequent statement may made gauged and provide a safeguard against late embellishment or a made up case. Truth will always come out in the first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others."**

36. That this position was upheld by the *Court of Appeal* in **Ajode vs Republic [2004] eKLR**

> **"Before an identification parade is held, a witness should be asked to give the description of the person sought to be in writing and the same together with the parade forms availed to the court so that it can compare the description given of the accused. It is an error in law therefore to ignore these guidelines."**

37. That throughout the trial the appellant asked for the OB entry, and the investigation diary but they were never supplied to him. That when the police finally availed the documents in 2020, they only availed the investigations diary that did not contain any description of the robbers. That the identification by the trouser he was wearing was unreliable and could not form the basis of a safe conviction, taking into consideration the manner of his arrest.

3) **Legal Representation.**

He submitted that the trial court failed to inform him that he had the right to legal representation after taking his plea, providing him with witness statements and documentary evidence. Citing **Article 50(2) (g) & (h)** he submitted that the court's failure to promptly inform him of the right to counsel led to an unfair trial. He relied on **Advocates Sans Frontiers (On behalf Bwampanye) vs Burundi, African Commission on Human Rights, Comm. No. 213/99 (2000), David Njoroge Macharia vs Republic, Criminal Appeal No. 497 of 2007, Pett vs Greyhound Racing Association, (1968) 2 All E.R 545, at 549**

And the more recent case of **Karisa Chengo & 2 Others vs R, CR Nos. 44, 45 & 76 of 2014,** it was stated;

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation."**

The appellant submitted that the record clearly demonstrated that he had not been accorded a fair trial, and that if he had legal representation, the process may have been different. He argued that the court failed to assess his status to ascertain whether it was one of those cases where substantial injustice would result if he was not represented.

4) **The sentence**

The appellant submitted that the sentence was harsh despite the fact that he was a first offender. He submitted that the court was not bound to give mandatory sentences.

That the trial court neither took into consideration the circumstances of the case when meting out the sentence nor adhered to the sentencing guidelines. In addition, he averred that the trial court did not take into consideration the time he had spent in custody.

38. The appeal was opposed by the state. Ms. Wambui for the state submitted as follows;

On the first ground – That the only issue was whether the appellant suffered any prejudice due to the manner in which the charge sheet was drafted. That it was clear from the particulars of the charge the elements of the offence of Robbery with Violence were clearly set out and the appellant proceeded to trial with that awareness. That he fully cross-examined the witnesses, and never raised the issue at trial. Counsel submitted that **Section 295 of the Penal Code** defined Robbery while **Section 295** defined Robbery with Violence that this was a defect curable vide Section 382 of the Criminal Procedure Code.

39. **On ground 2:** Counsel relied on **John Mwangi Kamau vs Republic [2014] eKLR** where the Court of Appeal held that failure to give a prior description did not invalidate the identification parade. She submitted that the identification parade was conducted in accordance with police standing orders, that the appellant was properly identified by the witness. That the circumstances in which the offences were committed were conducive to the identification of the appellant.

She argued that there was physical contact, the robbers spent about three (3) hours in the house which had sufficient lighting and the Appellant together with his colleagues had not covered their faces. That between the time of offence and time of arrest was barely two weeks, sufficient time for the witnesses to recollect how the appellant looked like. That he wore the same clothes he had on the day of the offences.

That failure of the identification witnesses to touch him did not negate the identification parade. That the Kalenjin accent was not the identification feature and failure to have him speak did not negate the identification. That the witnesses said they could identify him by appearance and one even stated that he had a familiar appearance.

40. **On ground 3**: It was submitted that the appellant never raised the issue that he actually needed legal representation, and the court never formed the view that he would suffer substantial injustice. Counsel relied on the case of **Mohammed Abdillahi vs Republic [2014] eKLR** where the Court of Appeal held that assignment of legal representation at state expense was not automatic. That having been furnished with the witness statements the appellant was not prejudiced.

41. **On ground 4**: Counsel submitted that the appellant deserved the sentences that were meted against him as they matched the gravity of the offences he had committed. Counsel urged the court not to interfere with the same. Counsel urged the court to take into account the circumstances of the offence, where three armed men entered the house, found two adult women and two minors, robbed them, raped one of the adults and defiled the minor, threatened similar acts against the baby, terrorizing and traumatizing the victims. Counsel urged the court to find that the sentence of death was justified. She pointed out that the appellant did not express any remorse, and that the prosecution had proved its case, both the robbery with violence and gang rape, beyond a reasonable doubt.

42. In his brief rejoinder the appellant submitted that he did not dispute that the offence was committed against the complainants, but that he was not involved in the same. That the trial magistrate was biased and did not weigh the evidence.

43. That he was denied a fair trial when he said he was not ready to proceed he was not heard, when he told the court he was appealing the trial court's decision, the court ought to have waited for the appeal but he was convicted without his defence being heard. That he had approached this court under **Article 23 and 156 of the Constitution.**

ANALYSIS & DETERMINATION

44. This being a first appeal this court is obligated to review the evidence and arrive at its own conclusions always bearing in mind that it did not see or hear the witnesses.

45. Having read the record, considered the submissions, the main issues that arise for determination are;

- ***Whether the charge was defective***
- ***Whether the appellant was prejudiced by not being informed of his right to legal representation***
- ***Whether the appellant was properly/positively identified***
- ***Whether the sentences meted to the Appellant were legal***
- ***Whether the appellant deserves a review of sentence***
- ***Whether the appeal succeeds.***

Whether the charge was defective

46. It is not in doubt from the record that the appellant was well aware of the charges that he faced. He was accused of stealing from the complainants while in the company of two others, while armed with crude weapons and threatened to cause harm and did cause bodily harm by raping one of the adult women, sexually assaulting the other one and defiling the minor using force. These circumstances were clearly demonstrated in the charge sheet as drawn and in the particulars and details are out in the evidence of the complainants. The appellant cannot be heard to say that the charge sheet was so defective that he did not know what he was facing. He has not therefore demonstrated what miscarriage of justice occurred to him by the fact of the charge being drawn as it was. There are cases where the manner in which a charge is drawn can create confusion. This is not one of those. The mention of **section 295** indicated the definition of the offence that is robbery. The mention of **section 296(2)** introduced the part where the felony becomes an aggravated offence carrying the sentence of death. The charge was clear on the face of it without the technicality of drafting. Hence I would find that the though the drafting of the charge may have been defective the appellant was not prejudiced by that and no miscarriage of justice occurred.

Whether the appellant was prejudiced by not being informed of his right to legal representation

47. **Article 50(2) (g) of the Constitution** provides that an accused person has the right to be informed, promptly, of the right to choose, and be represented by, an advocate. It is true that the record shows that no such information was given to the appellant. Unlike the argument by the prosecution about representation at state expense, the appellant's argument is that he was not informed of his right either way. Constitutionally, that was a violation of his right to fair trial. In addition the trial court upon such information, if the appellant was unable to afford counsel, the court was required to assess whether the appellant was eligible for representation at state expense. In **Republic v Karisa Chengo & 2 others [2017] eKLR** the court dealing with the issue of legal representation stated

> **"[94] In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:**
>
> **(i) the seriousness of the offence;**
>
> **(ii) the severity of the sentence;**
>
> **(iii) the ability of the accused person to pay for his own legal representation;**

(iv) whether the accused is a minor;

(v) the literacy of the accused;

(vi) the complexity of the charge against the accused;

[95] In concluding on the above issue, it is our finding that in addition to the specific guarantee of legal representation afforded to an accused person by Article 50(2) (h) of the Constitution, there is now in operation an elaborate legal aid scheme that is in the process of implementation following the enactment of the Legal Aid Act no. 6 of 2016 and we shall make appropriate Orders at the end of this Judgment as regards the present appellants' right to such legal representation."

48. From the record it is clear that the appellant was not informed of his right to counsel. There is also no record that learned trial made and assessment as to the eligibility or not, of the appellant to legal representation at state expense.

Whether the appellant was properly/positively identified

49. The appellant's position was that the fact that the complainants did not give any description of the persons who robbed and raped them that night, that there was no basis for their identification in the identification parade.

What is clear from this case is the period of time the perpetrators of this crime spent with their victims. The perpetrators operated with a strange boldness, as if they wanted the complainants to know who they were. They had the lights on. They raped them in turns with the lights on even sending their victims to the bathroom to bathe after the ordeal. They engaged in conversation with EMK when they wanted to rape JEA, and issued threats to her. The appellant was arrested about two weeks later. And the victims had no difficulty in identifying the appellant not only from his appearance but from the peculiar orange trouser he had won on the date of the offence. The trial court was persuaded that they were telling the truth and from the record and the circumstances of this offence I find no reason to doubt that evidence. The appellant was properly identified.

Whether the sentences meted to the Appellant were legal sentences

50. The appellant upon being found guilty opted not to mitigate. The trial court proceeded to mete out the mandatory death on the robbery with violence **Contrary to Section 296(2) of the Penal Code** charges in counts 1 to 3 and on the gang rape charges he was sentenced to life imprisonment.

51. On the mandatory death sentence, it is trite that under the **Muruatetu** principle the learned trial court was not obligated to sentence the appellant to death. On appeal this court has power under **Section 354(3)**

(a) in an appeal from a conviction—)[to]

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

52. This court has been urged by the prosecution to retain the death sentence. However, looking at the sentencing the learned trial magistrate did not record any reasons for the sentences meted out to the appellant. It would therefore appear that sentence of death was given because it was the mandatory sentence.

53. With regard to the sentences under the **Sexual Offences Act, section 10** of the act provides:

"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

54. Again, though it was within the discretion of the learned trial magistrate to give the sentence deemed appropriate in the circumstances, it was necessary to give reasons for the enhancement of the sentence.

Whether the appellant deserves a review of sentence.

55. There is a Kiswahili saying that says "*mgalla muue lakini haki yake mpe"*. The appellant was said to be a first offender. He decided not to mitigate probably because from the manner in which the trial had been conducted, it would not have mattered. On appeal, he is entitled to review of his sentence.

56. However, the appellant raised very fundamental issues with regard to the manner in which the trial was conducted. More fundamentally he was never given a chance to give his statement of defence. Despite the fact that the offence was heinous, the appellant deserved a proper and fair trial. That was the least the court was expected to grant him. It was also the duty of the trial court to hear his defence and if he refused to render it was imperative on the court to ensure that was a first offender.

57. The trial was originally conducted *by Hon MKN Maroro Ag. SPM.* He was transferred after taking the testimony of PW3 on 28th July, 2015. The matter was taken over on 26th May, 2016 by *Hon B. Mararo PM.* Upon compliance with **Section 200 of the Criminal Procedure Code** the appellant requested that the matter start *de novo.* The prosecution objected to the same. The learned trial magistrate made the following ruling:

> *"Directions were taken under section 200 of the CPC and the accused opted that the matter starts denovo. The state through Mr. Kihara learned state counsel opted that the matter proceeds due to the nature of the charges (Robbery with violence and rape) and that it is an old matter with only 2 witnesses remaining.*
>
> *He informed court that the accused fully participated in the trial and that the circumstances of the offence were very violent, horrifying, dehumanizing and traumatizing. He was of the view that subjecting the witnesses who have testified and are the complainants to revive those horrid moments would be highly prejudicial as they underwent the actual ordeal and have already revived it. I have considered all the matter placed before me and I note that the accused person fully participated in the hearing of the trial until its current stage. I have also perused the proceedings and the events described herein are extremely horrific. One can only imagine having to undergo the same.*
>
> *I therefore direct that the hearing of this trial proceeds from where it reached and proceedings to be typed. The accused is however at liberty to recall any witness that he wishes reheard at the close of the prosecution case. I also direct that the accused be supplied with witness statements of the witnesses.*
>
> *Delivered in open court in the presence of the accused, Mr. Kihara for the state this 1st day of July 2015"*

58. It is not clear whether the appellant got the proceedings but on 13th April 2017 when the matter came for hearing. He pointed out that he had applied to be supplied with the *OB report and investigation diary* but he was not supplied with the same and so when PW4 the police officer who conducted the identification parade testified he refused to cross examine him. The record reads:

> ***Court:*** *Accused has refused to participate in these proceedings alleging bias. I have refused to recuse myself as I have no interest and I find his application to be in bad faith and a delaying tactic.*
>
> ***Court:*** *This matter has been in court since 2014. He is at liberty to appeal against my decision to recuse myself.*
>
> ***Court:*** *Further hearing 15/05/2017*

59. The matter proceeded next to hearing on the 18th July 2017 when the prosecution closed its case. The accused prayed to recall the identification parade officer and the doctor who had testified on the 13th April 2021. On 25th July 2017, the trial magistrate ruled as follows;

> *"The accused have deliberately refused to cross examine.*
>
> *PW4 and PW5 (Doctor and identification parade officer) on 12/04/2017 he was informed of this right and opted not to participate. He now claims that he wants them recalled as he did not cross examine them. He had his chance and opted not to utilize it for reasons best known to him. The doctor is a professional and the identification parade officer is based in Nairobi. They made time to be there and offered themselves for cross examination on opportunity that the accused person opted to squander. I find his application to be lacking in merit and I proceed to dismiss it.*
>
> *The prosecution closed their case and I find them to have established a prima facie case sufficiently to warrant the accused to be placed on his defence."*

60. When **Section 211 Criminal Procedure Code** was complied with, the record shows that the appellant opted to make an unsworn statement of defence and not to call any witnesses. Defence hearing was fixed for 3rd August 2017. On that date the accused was unwell. On the 31st August 2017 when the matter came for defence hearing the record reflects the following;

> *"Accused – not ready to proceed. I have appealed against this court's Ruling*
>
> *"Court: This court gave the accused an opportunity to defend himself and he has opted not to. It is worthy to note that the accused has attempted to stall this matter since 2014. It is even court one time opted not to cross examine witnesses only for him to apply to recall them later. He has now opted not to offer any evidence and I direct that he closes his defence.*
>
> ***Court: Judgment 17/10/2017"***

61. It is evident from this record that the appellant's defence was never heard. When he told the court that he had appealed against the court's Ruling and considering that he was not represented the learned trial magistrate formed the opinion that he did not want to give his

defence. That is not what the accused said. He simply stated that he was not ready to proceed. The learned trial magistrate was duty bound to inquire about the alleged appeal and to record the appellant's responses

62. It is also evident that when directed to close his case there is nothing on record to show that he actually closed his defence. The learned trial magistrate directed the appellant to close his defence but did not give the appellant the opportunity to do that but instead proceeded to give a date for the judgment.

63. The record will also show that it was not just the appellant that sought for adjournments. The state took its share of adjournments as well and it was not fair for the court to lay the whole blame of the delay of the case on the accused. The court also delayed the matter while they were awaiting typed proceedings.

64. The appellant had a right to file an appeal against the trial court's rulings. The trial court told him as much. Therefore that court could not have proceeded to decide that his claim to appeal to be a delaying tactic. By failing to grant the appellant the opportunity to give his testimony the court failed to uphold the appellant's rights under **Article 50(2)(c)** to have adequate time and facilities to prepare a defence and **(k)** to adduce and challenge evidence. It is a fundamental principle of natural justice that no party should be punished unheard.

Disposition

65. Taking into consideration all the issues that went wrong with this matter, it is my considered view that it ought to go for retrial. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."*

*In the case of **Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported)** the Court stated as follows:*

> *"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."*

The Court of Appeal had this to say in **Samuel Wahini Ngugi v. R (2012) eKLR**: -

> *"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:*
>
> *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that **on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'***

And in **Moses Mwangi Kanyeki v Republic [2004] eKLR** the court stated;

> *"In the appeal before us, the victims of the robbery were from Nyeri town and they can be easily traced. The offence is alleged to have been committed within Nyeri town. Taking all these factors into account and in view of the fact that the appellant was charged with capital robbery, we are of the opinion that this is a proper case for a retrial. Hence, we order a retrial of the appellant."*

In **Peter Ngatia Ruga v Republic [2010] eKLR the** Court of Appeal stated:

> *We have considered many decided cases on principles that would guide the court when considering whether or not to order retrial. Some of these are cases such as Ahmed Sumar vs. Republic (1964) EA 481, Pascal Ouma Ogola vs. Republic, Criminal Appeal No. 114 of 2006, and Muiruri vs. Republic (2003) KLR 552. The principles in all those cases are as spelt out in the decision of this case in the case of Bernard Lolimo Ekimat vs. R Criminal Appeal No. 151 of 2004 (UR) where this Court stated:-*
>
> *"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."*

66. I have weighed, with much anxiety the twin possibilities whether an order for retrial in this matter which also has sexual offence will have not have the effect of further trauma of the victims, or whether it will cause injustice to the appellant. However the circumstances of this case, and the manner in which this is a trial was conducted just calls out for a retrial not an acquittal. The trial was not properly conducted. The appellant's conviction is not sustainable. It is my considered view that the interests of justice require a retrial in this case. I have considered the evidence before me and I have shown that on the evidence available and admissible could sustain the conviction if the

trial was properly conducted.

There are statutory safeguards for both sides. The Victim Protection Act, the Sexual Offences Act - for psychological assessment of the Victims considering the period of time that has passed. The offence is bailable. The court could give the case priority.

67. The upshot is, that the appeal is allowed. The conviction and sentence of death and imprisonment imposed upon the appellant by the trial court are set aside. He shall be retried by any Magistrate of competent jurisdiction other than Hon Mararo.

The trial shall take into consideration the provisions of the Victim Protection Act, and the Sexual Offences Act with regard to the requisite psychosocial support and protection of the victims.

The appellant be produced before the Chief Magistrate within fourteen (14) days of this judgment and his trial be concluded expeditiously.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JUNE, 2021.

MUMBUA T MATHEKA

JUDGE

Edna CA

Ms. Murunga for DPP

Appellant Present