REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 59 OF 2019

BETWEEN

JUSTUS KILONZO MUSYOKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 3403 of 2014 delivered by Hon. A. R. Kithinji (SPM) on 26th October 2018).

JUDGMENT

1. The Appellant, **Justus Kilonzo Musyoki** was charged with the following offences:

> **a. In count 1**: Robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The particulars of the same were that on the 19th July, 2014 at about 2130 hours at [Particulars Withheld] area in Njiru District within Nairobi County, jointly with others not before court, armed with an offensive weapon namely a pistol, robbed **TW** Kshs. 10,000/= and at or immediately before or after the time of such robbery, threatened to use actual violence to the said **TW**.
>
> **b. In count II:** Gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the same were that on 19th July, 2014 at about 2130 hours at [Particulars Withheld] in Njiru District within Nairobi County, in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of **TW** without her consent. In the alternative to count 2, he was charged with committing an indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act No. 3 of 2006** The particulars thereof were that on the 19th July 2014 at about 2130 in that he intentionally touched the vagina of **TW** with his penis against her will.

2. The Appellant pleaded not guilty to all the charges. Upon trial, he was found guilty of count I and II above and convicted accordingly. He was sentenced to serve fifteen (15) years and ten (10) years imprisonment respectively. The said sentences were to run concurrently. Aggrieved by both the convictions and sentences, he preferred the instant appeal to this court.

Grounds of Appeal

3. The Appellant was aggrieved that the police violated his constitutional right under **Article 49 (1) (f)** of the Constitution. He faulted the charge of robbery with violence for being duplex since it was drawn as 'contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code'**. He was aggrieved that there was a discrepancy between the charge sheet and the evidence tendered. He took issue with the complainant's failure to give his description in her first report to the police. He also argued that there was no conclusive proof of the offence of rape. Further, he was aggrieved that the electronic print outs were admitted in evidence contrary to the provisions of **Section 106B (4)** of the **Evidence Act**. Finally, he argued that his alibi defence was not disproved by the prosecution.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

5. The Prosecution's case can be summarized as follows: On 19th July, 2014 at about 10.00 pm, the complainant herein **PW1, TW,** was walking home when she was accosted by the Appellant and another man who had a gun. They told her that they had been sent to kill her.

PW1 raised her hands and gave them her handbag. They took Kshs. 1,800/= from her bag and Kshs. 700/= from her pocket. Thereafter, they led her to a nearby maize plantation where they spent about three hours. While there, they took her phone and demanded for her M-Pesa PIN number which she gave them. Upon finding out that she had no money in her M-Pesa account, they called her sister's phone.

6. PW1's brother-in-law **PW3, EKM** picked the call. He spoke to one of the attackers who demanded Kshs. 20,000/=. Since he did not have that sum of money, he tried to negotiate with the caller to accept a lesser amount. The caller threatened to kill PW1 if PW3 failed to send him at least Kshs. 10,000/=. PW3 sent the said amount to PW1's phone number. Thereafter, the Appellant left PW1 with the man who had a gun as he went to look for an M-Pesa shop to withdraw the money. The man ordered PW1 to remove her clothes then raped her. When the Appellant returned, he also raped her. Thereafter, they ordered her to dress up, gave her back her sim card and escorted her away from the bush. Although the place was dark, PW1 stated that the light from the vehicles passing nearby and the neighbouring shops enabled her to identify her attackers. She also stated that they passed through streets with lights as she was being led to the maize plantation. She however did not describe them in her statement but told the police that she could identify them if she saw them.

7. PW3 went to PW1's house on the same night and found her crying. He took her to Mowlem Police Station to report the incident. She informed the police that she could identify her attackers if she saw them. Thereafter, the police called an ambulance which took PW1 to Mathare MSF Hospital.

8. PW1 was examined at the health facility on 20th July, 2014 at 2.00 am. She was normal on physical examination. Her outer genitalia, clitoris and labia were normal. Her vagina had clear mucoid discharge. A high vaginal swab and urinalysis test revealed that there were spermatozoa in her vagina. Both urinalysis and pregnancy tests were negative. HIV was not reactive but she was given PEP vaccine, STI prophylaxis and emergency contraceptive since the act was done without any protection. The Post Rape Care report prepared in that regard was produced in evidence by **PW4, Selina Nyambura**, a clinical officer from the said health facility.

9. About two days later, PW1 saw the Appellant at the stage wearing a brown shirt with a black 'kinyasa' which he had worn on the night of the incident. She informed her brother who escorted her to the police to make a report. **PW5, PC Jesse Nicholus Wanjau** of Dandora Police Station accompanied PW1 to the Stage where she identified the Appellant leading to his arrest. PW5 took the Appellant to Mowlem police post and confiscated his Nokia mobile phone and sim card. They checked the Appellant's phone and found a message showing a transfer of money from PW1's mobile phone number to his phone on the same date and time of the alleged incidents.

10. Both PW1 and the Appellant were examined by **PW2, Dr. Joseph Maundu** of Nairobi Police Surgery on 22nd July 2014. On examination, PW1 had no injury. She had normal external genitalia. Her hymen had abrasion with old tears and she had a whitish discharge. The Appellant also had no injuries on his genitalia and anal area. PW2 filled their P3 forms which he produced in evidence.

11. The case was investigated by PW5, PC Jesse Nicholas Wanjau of Mowlem Police Post, under Dandora Police Station. He visited the scene of crime. He also went to Safaricom and obtained a print out of PW1's M-Pesa statement indicating that Mobile Phone number [……] belonging to PW1 transferred Kshs. 9940/= to the Appellant's mobile phone number [……] on 19th July, 2014 at 22.40pm. PW5 produced the said statement as well as the Appellant's mobile phone and sim card in evidence.

12. After the close of the prosecution case, the trial court that the Appellant had a case to answer and was accordingly put on his defence. He testified as DW1 and gave a sworn testimony in his defence. He called one witness in support of his defence. He stated that he was a matatu driver on route 32. He denied being involved in the incidents of the night of 19th July, 2014. He stated that he was not in Nairobi then as he had travelled to his rural home on 16th July, 2014. Upon his return on 21st July, 2014, he got a call from his employer informing him to leave the car at the stage and go to the police station. While he was still passing time, a motor vehicle registration number KBA 752A Toyota Saloon stopped where he was. Four men jumped out of the vehicle and ordered him to stand and raise his hands. They introduced themselves as police officers. He was arrested alongside one Boniface Mwangi and taken to Mowlem Police Post. He asked them why he had been arrested and they informed him that he was a suspect in a robbery case.

13. The police showed him a printout bearing a mobile phone number […….] which he denied any knowledge of and told them that it does not belong to him since his number is [……..]. He also denied receiving any money from PW1 on the date and time of the incident or at all. Two police officers started saying that an identification parade be conducted but it was not done. He was later charged with the offences in question. He denied receiving any money from PW1 on the night of 19th July, 2014. He also stated that the mobile phone produced in court by PW5 was not his and claimed that his phone and wallet had been given to his wife upon his arrest.

14. DW2, Duncan Kilonzo was the Appellant's father. He stated that the Appellant was at his home in Machakos on 19th July, 2014. He had gone there on 16th July, 2014 upon his invite to attend a dowry ceremony. He stated that there were other people in attendance of the ceremony but he had not brought them to court with him.

Analysis and determination

15. This appeal was canvassed by both written and oral submissions. The Appellant filed his written submissions on 4th November, 2019 and appeared in person during the oral highlighting of the same. The Respondent on the other hand was represented by the learned state counsel, Ms. Kibathi who only tendered oral submissions in opposition of the appeal.

16. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that the following are the issues for determination: whether the Appellant's constitutional right under **Article 49 (1) (f)** was violated; whether the charge of robbery with violence was duplex; Whether there was a discrepancy between the particulars of the charge of robbery with violence and the evidence tendered in respect thereof; whether the prosecution proved the offence of robbery with violence against the Appellant to the required stand; whether the prosecution proved the charge of gang rape against the Appellant to the required standard; and whether the prosecution failed to disprove the Appellant's alibi defence.

Whether Article 49 (1) (f) of the Constitution was violated

17. The first complaint raised by the Appellant is that the police failed to present him in court as soon as was reasonably possible after his arrest. He argued that the delay of one day violated his constitutional right under **Article 49 (1) (f)** of the **Constitution.** The said Article states that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than twenty four hours after being arrested.

18. A perusal of the trial court's record reveals that the Appellant was arrested on 21st July, 2014 and arraigned in court on 23rd July, 2014. There was therefore a delay of one day which was no doubt a violation of the Appellant's aforesaid constitutional right. However, the violation which was not inordinate in any event, cannot be remedied by this court since it has no impact on the innocence or guilt of the Appellant. The remedy lies in an action for damages in a civil court and not in an acquittal of the charges brought against him. In **Patrick Daniel Lesadala V Republic (2019) eKLR,** the Court of Appeal held that:-

> ***"……Moreover, the appellant's relief with regard to this violation is no longer an acquittal. Courts have since held that where there is such a violation, an accused's remedy lies in compensation by way of damages against the State. For instance, in Julius Kamau Mbugua v Republic (2010) eKLR the Court of Appeal observed that a violation of the constitutional provision stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal since such an accused person could be adequately compensated by way of monetary damages."***

Whether the charge of robbery with violence was duplex

19. The Appellant submitted that the charge of robbery with violence was duplex in view of the fact that it was brought under both sections **Section 295** and **296 (2)** of the **Penal Code**. He contended that as a result thereof, he was not aware of the exact charge he was facing since the two sections provide for two different offences. He also argued that the duplicity made it difficult for him to tender a proper defence.

20. ***Section 295*** of the ***Penal Code*** provides as follows:

> ***"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".***

21. ***Section 296*** of the ***Penal Code*** on the other hand 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 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".***

22. It is not in dispute that **Section 295** of the **Penal Code** creates the offence of simple robbery which is different from the aggravated offence of robbery with violence created under **Section 296 (2)** thereof**.** The punishment prescribed for the two offences are also different with the latter carrying a more severe sentence. It is therefore true that the charge as framed is duplex. In the case of **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR** the Court of Appeal held that:

> ***"We reiterate what has been stated by this Court (sic) in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides 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 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".***

23. What then is the effect of the duplicity envisaged in the charge as framed? The Court of Appeal in the case of ***Paul Katana Njuguna v Republic [2016] eKLR.*** stated as follows in this regard:

> ***"Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. ……..***
>
> ***39. We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.***
>
> ***40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable***

to charge an accused person under <u>both sections in the alternative</u>, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

41. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."

24. Similarly, in this case, the Appellant was fully aware that he was facing a charge of robbery with violence and not just simple robbery. He fully participated in the proceedings by cross examining the prosecution witnesses and also tendered an alibi defence besides calling one witness to corroborate his defence. It is also the charge to which he pleaded. The duplicity was therefore not fatal as it did not result to any miscarriage of justice.

<u>Whether the prosecution proved the offence of robbery with violence beyond a reasonable doubt</u>.

25. One of the issues raised by the Appellant is that there was discrepancy between the particulars of the charge of robbery with violence and the evidence tendered. The Appellant argued that the charge sheet stated that PW1 was robbed of Kshs. 10,000/= whereas she testified that she was robbed of Kshs. 1,800/= from her bag, Kshs. 700/= from her pockets and Kshs. 10,000/= M-Pesa from PW3. A scrutiny of the evidence shows that the only discrepancy was the mentioning of a further Kshs. 1,800/= and Kshs. 700/= which were not in the charge sheet. My finding is that this discrepancy was immaterial and did not occasion any miscarriage of justice. I am guided by the sentiments of the Court of Appeal in the case of ***<u>Kimeu</u> v. Republic [2002] 1 KLR 757*** *that:*

"The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernable prejudice is caused to the accused."

26. On whether the offence itself was established, it is incumbent upon the court to first consider whether the evidence on record was credible and sufficient. The offence is established where the prosecution proves that either of the elements prescribed under **Section 296(2)** of the **Penal Code** were met. These are that:

a) ***The offender is armed with a dangerous or offensive weapon or instrument; or***

b) ***The offender is in the company of one or more person or persons; or***

c) ***If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.***

27. PW1 testified that on the fateful night, she was accosted by two men. One of them was armed with a gun which is no doubt a dangerous weapon. They robbed her of Kshs. 1,800/= from her bag and Kshs. 700/= from her pocket. Thereafter, the attackers called her brother in law PW3 demanding for a further Kshs. 10,000/= and threatened to kill PW1 if the amount demanded was not sent. PW5 confirmed that the said incident was reported at Dandora Police Station on 19th July, 2014. In the premises, I find that two of the elements of the offence, either of which is sufficient to prove that it was committed were established.

28. The next issue for determination is whether the Appellant was positively identified as one of the attackers. On this issue, the Appellant faulted the trial court for failing to warn itself of the danger of relying on the sole evidence of PW1 before convicting him as set out in **<u>R v Turnbull & Others (1976) 3 All ER 549</u>)**. In rebuttal, the learned state counsel submitted that the prosecution proved the offence against the Appellant beyond any reasonable doubt.

29. PW1's evidence was that while the attackers were leading her to the maize plantation, they passed through streets with lights. She was emphatic that while in the maize plantation, there was sufficient light from vehicles passing nearby as well as from the neighbouring shops. It was also her evidence that she spent a considerable time, that is, three hours with her attackers in the maize plantation and that the three of them were chatting all the while. Further, upon reporting the matter at Mowlem Police Station, she informed the police that she could identify her attackers in case she saw them. Indeed, two days later she identified the Appellant at the stage wearing the same clothes he was wearing at the time of the attack and rushed to inform the police who went and arrested him.

30. A scrutiny of the trial court's judgment reveals that indeed, the trial court accordingly warned itself of the danger of relying on the sole evidence of PW1 before convicting the Appellant. This was proper because identification evidence can bring about a miscarriage of justice if not tested carefully. (See **<u>R v Turnbull & Others (1976) 3 All ER 549</u>).** However, in addition to PW1's testimony outlined hereinabove, I note that PW1 and PW5 gave consistent evidence that upon the arrest of the Appellant, his phone was confiscated and a text message found therein showing a transfer of money from PW1's mobile phone number to his phone on the same date and time of the alleged incidents. In my view, this established an undeniable nexus between the Appellant and this offence. In the circumstances, I am satisfied that PW1 positively identified the Appellant as one of her attackers.

31. Further, the Appellant in his submissions filed herein faulted PW1 for failing to give his description to the police when she made her first report. In his view, this showed that his identification was questionable. However, such omission is not considered fatal if a witness informed the police, when making the first report, that she would be able to identify her attacker(s) if she saw them again as was the case herein. (See ***<u>Nathan Kamau Mugwe vs. R - Criminal Appeal No. 63 of 2008 (UR)</u>***.

32. It was the Appellant's further submission that PW1's M-Pesa statement printout was admitted in evidence contrary to the mandatory provisions of **Section 106B (4)** of the **Evidence Act**. He argued that its authenticity could not be proved as it was not accompanied by a certificate of the person who printed it out as by law required. He also argued that the M-Pesa statement is a forgery since it does not bear the signature of the maker. The learned state counsel conceded that the printout was not accompanied by the requisite certificate. She however submitted that there was no doubt that the print out emanated from Safaricom since as held by the trial court, it is the organization that houses M-pesa.

33. From the evidence on record, it is evident that the prosecution further relied on the M-pesa statements printout allegedly obtained from Safaricom to establish a connection between the Appellant and this offence. I have perused the print out which clearly indicates that PW1's phone number […….] sent Kshs. 9,940/= to JUSTUS KILONZO of […….] at 22.40pm which is about the same time when PW1 alleges that the Appellant attacked her.

34. However, it is important to note that an M-pesa transaction is electronic evidence and therefore subject to the mandatory provisions governing the admissibility of such evidence. Indeed, electronic evidence can only be admissible if accompanied by a certificate prepared under **Section 106B (4)** of the **Evidence Act** by a person who is competent in the management of the electronic devise, outlining the manner in which the information was extracted. The said Section provides as follows:

> ***"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following--***
>
> ***(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;***
>
> ***(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;***
>
> ***(c) Dealing with any matters to which conditions mentioned in sub-section (2) relate; and***
>
> ***(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."***

35. In the absence of such a certificate therefore, I agree with the Appellant that the M-pesa statement printout was inadmissible and unreliable as its authenticity could not be vouched for. I am guided by the case of ***Charles Matu Mburu vs. Republic* [2014] eKLR**, where the Court of Appeal, in similar circumstances, observed that;

> ***"In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.***

36. Further, the Appellant argued that the mobile phone number to which the money was sent did not belong to him and that it was just a coincidence that his name was similar to that of the recipient. I note that this was an afterthought as the Appellant only raised this issue in his defence. Be that as it may, having found that the M-pesa print out was inadmissible, I see no need of delving further into this issue.

37. I have also noted that the Appellant tendered an alibi defence that he was at his rural home in Machakos on the day of the alleged incidents having travelled on 16th July, 2014 and that he returned on 21st July, 2014. He faulted the prosecution for failing to disprove the alibi. In ***Kossam Ukiru v. R* (2014) eKLR,** the Court of Appeal held as follows:

> ***"We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."***

38. Similarly in this case, the Appellant did not raise his alibi defence during the prosecution's case. His counsel cross examined PW1 after her testimony but did not lead evidence to suggest that on the night of the incident the Appellant was away at his rural home. Accordingly, I find that the Appellant's alibi defence did not weaken the strong evidence tendered against him by PW1. The end result is that the prosecution has indeed proved its case against the Appellant on the charge of robbery with violence to the required standard.

Whether the prosecution proved the offence of gang rape against the Appellant to the required standard

39. Section 10 of the **Sexual Offences Act** provides for the offence of gang rape as follows:

> ***"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."***

40. From the said provision, it is clear that there are two key ingredients of the offence namely: Proof of rape or defilement; and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

41. Section 3 of the **Sexual Offences Act** provides as follows regarding the offence of rape:

> ***"(1) A person commits the offence termed rape if—***
>
> ***(a) He or she intentionally and unlawfully commits an act which causes penetration with his or her 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.***

42. It is important to note that one of the key ingredients of the offence of rape is the positive identification of the offender. This element, in my view, has already been answered hereinabove. Further, the element of penetration was established by PW1's testimony and corroborated by the medical evidence which showed that a high vaginal swab and urinalysis test conducted at the health facility revealed the presence of spermatozoa. I will therefore proceed to consider whether the penetration was intentional and unlawful and whether PW1 consented to the penetration or her consent was obtained by force or by means of threats or intimidation of any kind.

43. On this issue, the Appellant contended that since the medical report indicated that PW1 did not have any internal or external vaginal injuries, it showed that she did not resist the act meaning therefore that it was consensual and did not amount to rape. He further argued that had PW1 been raped by two men in succession as alleged, spermatozoa would have been seen all over her vagina and not just in her upper vagina after a high vaginal swab.

44. Under **Section 42** of the **Sexual Offences Act**, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. Further, **Section 43 (1) and (2)** of the **Act** provides that:

> ***"(1) An act is considered to be intentional and unlawful if committed under three circumstances namely;***
>
> ***(a) In any coercive circumstance;***
>
> ***(b) Under false pretences or by fraudulent means; or***
>
> ***(c) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.***
>
> ***(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—***
>
> ***(a) Use of force against the complainant or another person or against the property of the complainant or that of any other person;***
>
> ***(b) Threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or***
>
> ***(c) Abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act."***

45. In view of the above statutory provisions and PW1's testimony, I have no doubt in my mind that the penetration was intentional, unlawful and was done against PW1's will. Further, from the evidence on record, I am satisfied that the Appellant committed the offence of rape in association with an accomplice who unfortunately was never brought to book. The end result is that the prosecution proved the offence of gang rape against the Appellant beyond any reasonable doubt. As such, there was no need to conduct a DNA test to determine whether the spermatozoa found in PW1's vagina matched the Appellant's DNA as claimed.

Conclusion

46. In the end, I find that this appeal lacks merit and I uphold the conviction. As regards the sentence, in view of the grave circumstances under which both offences were committed, I find no reason to disturb it. In sum, the appeal is dismissed in its entirety. I uphold both conviction and sentence. It is so ordered.

DATED and DELIVERED this 2nd day of March, 2020

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Mr. Momanyi For the Respondent.