



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 46 OF 2018

KELVIN LOPEYO LOLIM.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 637 of 2016 delivered on the 21st day of May, 2018 by Hon. J.L. Tamar, PM]

JUDGMENT

Introduction

[1] By Judgment delivered on 21st May 2018, the appellant was convicted for the offence of robbery with violence c/s 296(2) of the penal Code and gang rape c/s 10 of the Sexual Offences Act and on 30th May 2018 sentenced to serve imprisonment for 30 and 15 years respectively, the two sentences running concurrently.

[2] The particulars of the offences were that –

Count I: Robbery with violence contrary to section 295 as read with 296(2) of the Penal Code

Kevin Lopeyo Lolum: *On the night of the 19th day April 2016, at Mogotio Township in Mogotio sub-County within Baringo County you and others not before the court jointly robbed Joy Ruto of her mobile phone make Nokia Asha 200, valued at ksh.9,500/-, Ksh.700 in cash, 5 packets of wheat flour valued at ksh.700/-, two packets cakes valued at 200/-, two bar soaps valued at 240/-, half dozen of tea leaves valued at ksh.250/- and Ksh.5,600/- forcibly transferred through MPESA from her mobile number no.0720889753 to mobile number 0792637319 all valued as Ksh.17,190/- and at the time of such robbery beat and raped the said Joy Ruto.”*

Count II: Gang rape contrary to section 10 of the Sexual Offences act NO. 3 of 2006

Kevin Lopeyo Lolum: *on the night of 19th April 2016 at Mogotio township in Mogotio Sub-County within Baringo County, having common intention to penetrate the vagina of Joy Ruto without her consent was in the company of another not before the court who intentionally and unlawfully caused his penis to penetrate the vagina of the said Joy Ruto.”*

[3] In sentencing the appellant, the trial court (Hon. J.L. Tamar, P.M. who delivered Judgment on behalf R. Yator, SRM) ruled as follows:

“SENTENCE

The trial court Hon Rhodah Yator Senior Resident Magistrate found the accused person guilty in both counts; that is Robbery with violence contrary to section 296(2) of the Penal Code and gang rape contrary to section 10 of the Sexual Offences Act.

The accused is remorseful and prays for a non-custodial sentence. The death sentence prescribed by section 296 (2) of the Penal Code in relation to the first count is no longer mandatory. The mandatory nature of death sentence was declared unconstitutional by the supreme Court in Petition No. 15/2015 as consolidated with Petition No. 16/2015.

That being the case and taking into account the accused mitigation and the fact that he is a first offender, I sentence him to 30 years imprisonment in Count I and years being the minimum sentence provided under section 10 of the sexual Offences Act.

The accused has 14 days of Appeal. Sentences to run concurrently.

Hon. J.L. Tarmar

30.5.2018.”

The Appeal

[4] The appellant appealed from both conviction and sentence on several grounds of law and sufficiency of evidence as set out in the Amended Grounds of Appeal as follows:

1. *The learned trial magistrate erred in law and fact in convicting the appellant while relying on identification evidence by PW1 Joy Ruto whereas the circumstances of identification were not favourable for a positive identification.*
2. *The learned trial magistrate erred in law and fact in admitting evidence which was inadmissible in law.*
3. *The learned trial magistrate erred in law and fact in convicting the appellant on duplex charge, and misjoinder of charge contrary to the law.*
4. *The learned trial magistrate erred in law and fact in failing to comply with the clear provisions of section 214 of the criminal Procedure Code.*
5. *The learned trial magistrate erred in law and fact in admitting documentary evidence EXHIBIT 4, 5, 7 (c),8, 9 (a) (b), 10 11 whereas the same were inadmissible in law.*
6. *The learned trial magistrate erred in law and fact by failing to resolve material contradictions and inconsistencies in favour of the appellant.*
7. *The learned trial magistrate erred in law in failing to appreciate that the appellant’s constitutional right to fair hearing in Article 50(2) (j) of the Constitution were flouted and violated, that is, the appellant asked for prosecution witnesses’ statements and whereas no statements were served by the prosecution thus right for disclosure was violated.*
8. *The learned trial magistrate erred in law and fact in failing to take into account and or consider the appellant’s plausible defence.”*

Submissions

[5] The appellant elaborated his grounds of appeal by written submissions filed therewith as follows:

“Identification

It is my humble submission that the appellant’s conviction and sentence were not founded the same were not safe. It is based on evidence of a single witness PW1 and was not corroborated. The magistrate did not warn herself on the danger of convicting the appellant on such evidence. Had she warned herself on the danger she would have returned a verdict of not guilty. I rely on Maitanyi v. R (1986) KLR circumstances prevailing at the material time were not favourable for a positive identification. 9.30pm was at night, PW1 was seated on her bed communicating with her family at home when the attackers came out under her bed abruptly beating her heavily her phone fell down into pieces. She was ordered to put out light she complied and immediately one of the attackers sat on her lay on her forcefully raping her beating her threatening her not to look at the rapist. At what time did she see the appellant’s face? The magistrate should have directed her mind on these facts, or should have considered that the PW1 was not in a position to see the appellant’s face and or physical features mentioned in evidence (see pg 13 lines 5-6, pg 16 line 10-11)

The magistrate did not consider the position relating to the assailant, the circumstances of her identification. If PW1 was not in a position to see and or identify the alleged rapist who was very close to her how was she able to see and or identify the appellant who was at a further end in the darkness. (see pg.12 lines 1-5, 20, pg. 13 lines 1-5 lines 8-9, pg.16 lines 1-3, 10-11). Thus doubtful. See pg 11 lines 13-bottom line. See also pg 12 lines 1-6 where [it] was said thus:

“...I took supper at around 8.30pm... I had a hurricane lamp and sport light I was talking while inside the bedroom I had put off lights... I just heard being hit on the forehead with a piece of wood which was and another strangled me on the neck and I heardswitch off the light and I switched off lamp one sat on me on the bed one her was going round with a torch they hit me my phone fell down and separated in part... when other one who had on me started to rape me as the one standing with knife was looking and as he was stall and not very dark with green white sports sweater... going round the house... and is the one who had torch as the light from the torch were sufficient...”

The upshot clearly reveals that the complainant never described the appellant before arrest and or at any time. NO identification parade was made the reasons explained by the prosecution were remote inferior PW1 relatives had no nexus with the present case they were not present at the scene of identification, therefore the complainant PW1 identification evidence was dock identification which is worthless in law. I rely on Gabriel Kamau Njoroge v. R (1987) KLR and Tinenga v. R (2014) eKLR.

The complainant never described the appellant or the alleged attackers to any person in authority. Complainant should always describe complexion, physical features, marks and clothing to police initial report from the evidence to be water tight. Nowhere in evidence police mention any description see PW8 evidence. PW1 mention two men the appellant was not arrested through the strength of the complainant or the alleged features mentioned in evidence see pg 46 lines 6-14, see how investigation officer tells court on the same page, line 59, 15-17, as follows:

“...as per statement of the complainant there were two suspects who threatened to kill her beat her up and were not arrested.”

And pg 61 lines 6-7 where IO PW8 states:-

As per the complainant first report she did not as per entry state if she had identified the assailants...

The only source of light relied on by the prosecution is alleged to have been emanating from a torch handled by the assailant. No evidence was led as to how the torches were handled, the intensity and quality of light was not explained circumstances of identification were not considered. Light would have proved basis of identification. In this regard I rely on *Turnbull & Other v. DPPP (1976) 3 ALLER 552* and *Maitanyi v. R (1986) KLR*. See also *Osiwa v. R (1986) KLR*.

I therefore urge the court to find that the circumstances of identification were not favourable for positive identification the same were not free from possibility of error and finally disregard the PW9 identification evidence in totality.

Mode of Arrest: Documentary/ Scientific Computer Evidence

It is my humble submission that the appellant was not arrested through the strength of the complainant or the alleged feature described in the evidence. Nowhere in evidence did the prosecution produce any documentary evidence in support of the alleged transaction and or any person called by the prosecution to confirm PW4 allegations. The person alleged to have borrowed Ksh.500/- (Baba Sonko) and the owner of the second phone exchanged with Ex No. 6 Wiko phone that is Samsung Galaxy Billy Sadala had not been called to clear smoke surrounding the alleged transaction.

The name Baba Sonko is not indicated on the particulars of the charge as alias to Kevin Lopiyo Lolim. Therefore it is my submission that the prosecution had failed to prove beyond reasonable doubt that the appellant borrowed money from PW4 and exchanged the alleged phone Ex. NO.6 at any time and or took control of the alleged phone during the period mentioned in the evidence. This would have had there been proved had there been evidence from the said Billy Sadala or any documentary evidence confirming such transaction occurred. Failure for such evidence brings us to the crux of the matter and it is my contention that no transaction occurred. PW4 had a duty to prove indeed the appellant handled his phone during the alleged period. See section 117 of the Evidence Act:

“Where there is a question as to good faith of transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.”

It is my further submission that the prosecution had failed to prove beyond doubt that the Cell phone NO. 0792637319 registered in the appellant's name ie. Kevin Lolim ID 29090384. It is also alleged that both Sim cards were inserted in Cell phone OMEI NO. 357258070534170 Wiko phone Ex. 6 pg 57 line 15 bottom line see pg 61 line 5. Having several IMEI numbers on record clearly proves there were made up believe evidence which the learned trial magistrate accepted and as such she grossly erred in becoming obliged to convict the appellant on the basis [of] inconsistent and contradictory evidence. See his Judgment on pg 128 p1-3 of the Judgment thus insufficient incredible evidence. It is my submissions that the inconsistencies touches to the root of the prosecution case and thus raises a serious doubt as to whether the WIKO phone was used by the appellant thus doubtful.

Documentary Evidence

Questionable scientific documented evidence. It is my humble submissions that PW8 CL Shirandula the investigating officer evidence was inadmissible in law. PW8 was not the maker of the documentary evidence produced as exhibit No. 4(a) Police Abstract a copy of ID produced as Ex NO.5, Notice of Motion EX. 7 (a), Order dated 28/4/2016 Ex 7 (c), Affidavit Ex. 7 (b), Mpesa statement EX. NO.8, letter to registrar of persons Ex. 9 (a), Reply dated 23/06/2016 Ex No. 9(b), Safaricom statement Ex. 10. Exhibit 4, 5, 7(a) (b), 8, 9 & 10 were not made by PW8 they were stored and produced from a computer whereas there is no evidence from the maker or experts as provided by the law. Therefore PW8 evidence is inadmissible in law within the meaning of section 106B of the evidence Act where it stipulates...

All these documents were retrieved from computers printout and whereas no expert was called by prosecution PW8 was not trained to handle computers he has no skills working in those institutions where high profile professional personnel are required to handle this matters therefore it is my contention that the prosecution case remains unproved. I rely on *Pravin Singh Dhalay v. R (1997) eKLR*. See case of *Kinyanjui v. R (1981) eKLR*.

Gang rape

On p.129 line 12-17 the trial magistrate fell in error in accepting the PW identification evidence thus she became obliged to convict the appellant on reliance of identification through light from torch handled by assailants nowhere the record shows the lights from the torch was shone on the appellant. The Prosecution had failed to prove beyond reasonable doubt that the appellant was in

company of the rapist on the night of 19/4/2016. Having submitted at length that the identification evidence by the PW1 was doubtful the presence of the appellant at the scene of the rape remains questionable, thus an offence of gang rape charged remain unproved against the appellant within the meaning of section 10 of the Sexual Offences Act. It is my submission that it is trite that the onus of proof lies on the prosecution and the accused person is under no obligation of proving his innocence passing her judgment not appreciating that there were possibility of errors the decision to dismiss the appellant's defence is very remote, inferior and thus occasioned a great miscarriage of justice. I rely on *Woolmington v. DPP (1935) AC 481*.

Duplex charge

It is my humble submission that the charge sheet as laid out on the particulars of the charge and the statement of the offence were both bad for duplicity, that is the appellant was charged under section 295 as read with section 296 (2) of the Penal Code. Therefore the statement of the offence carries two different offences and this occasioned great miscarriage of justice.

It is also important to note that it is on record that the complainant JOY RUTO was beaten and raped (see the particulars of the offence in Count I) whereas no amendment was made to the particulars of the charge or on the statement of offence robbery with violence and rape each have different mode of committing the offence the section of law that creates robbery with violence is different from the section that creates an offence of rape. Therefore, it my humble submission that the charge sheet as laid out a statement of offence and particulars of offence is incurably defective because [it] amounts to a duplex misjoinder of charge thus denies the appellant a right to defend himself. In this regard I rely on the recent decision of the court of Appeal in *Joseph Njuguna Mwaura and Others v. R (2013) eKLR*. The mode of framing charges rules must be followed as it is life of an individual that is at stake, see *Juma v. R (2003) KLR*. See also *Kilome v. R (1990) KLR* and *Sigilai & Another v. R (2004) KLR* and *Mohammed Bahsir v. R (1950) EACA 89*.

Violation of section 214 of CPC

It is my humble submission that the prosecution has failed to prove beyond reasonable doubt that the complainant was robbed of the alleged stolen items and cash indicated on particular of the charge and the alleged money Ksh.5,600/- was transferred from the complainant's cell phone NO. 0720 889 753 to cell-phone 0792 637 319 through a WIKO cell-phone handset IMEI NO. 3535950074115793 which is alleged to have been borrowed from PW4 Daniel Omondi Okinda.

The prosecution amended the charge sheet to reflect what they believed was the correct value of what is alleged to have been stolen and the appellant went through trial on an amended charge that indicates that the complainant JOY RUTO was robbed of a mobile phone Nokia Asa valued at Ksh.9,500/-, cash 700/-, 5 packets of wheat flour valued at 700/-, 2 packets of cakes valued at Ksh.200/-, 2 bar soaps valued at Ksh.240/-, ½ dozen tea leaves valued at ksh.260 and Ksh.5,600/- transferred forcefully through M-Pesa ... all valued at Ksh.17,190.

The upshot is very clear that the total value of what was stolen is Ksh.17,190/- as amended charge sheet whereas the recorded evidence tendered in court by the complainant does not agree with what was indicated on the particulars of the charge. See p.15, lines 5-7 where it is stated thus:

“My hone takes was Nokia, I bought it at ksh.9,400/- when I went to Kiosk I noticed item stolen were Ksh.700/-, tea leaves 250kgs, I dozen EXE flour, sconces of 2\Ksh.200/-, 2 bar soaps....see p14 line 11.”

Adding the figures, that is 9,400, 700, 200 plus what is alleged to have been transferred from the complainant's phone the total value must have been around Ksh.15,900 which is less than Ksh.17,190 and also more than what the complainant gave in evidence when she was recalled on the 15-03-2017 where she stated “in total I lost Ksh.5,600/- and MPesa alone was Ksh.3000/-” see p.32 line 2

Adding 5600/-+3000/- the total value is Ksh.8,600/- which is lesser than 15,900/- mentioned in the first instance and lesser than Ksh.17,190 indicated on the particulars of the charge. [T]he prosecution never amended the charge despite variance of the total value on particulars of the charge and he charge was defective within the meaning of section 214 of CPC in this regard. I rely on *Jason Akumu Yongo v. R (1983) KLR 3*.

It is therefore my considered submission that the charge sheet as laid out on both its face, form were both incurably defective because the appellant went through a trial on the evidence which did not tally with what was indicated on the charge sheet and occasioned a miscarriage of justice.

Disclosure

It is my considered submission that the appellant's constitutional right to a fair hearing enshrined in Article 50 (2) (j) of the Constitution were flouted and violated in that the appellant prayed for disclosure of prosecution statements, charge sheet and all other documentary evidence prior to commencement of the trial and these were denied (see p6 line 12, p.7 line 19-20 of the typed proceedings. I rely on *Thomas Gilbert Patrick Colmoneley v. R. (2008) eKLR*.

Reasons wherefore, I pray that this appeal be allowed, the conviction quashed [and] sentence set aside.”

[6] At the hearing of the appeal, the DPP opposed the appeal in oral submissions as follows:

“29/1/2020

Appellant

I have written submission together with authorities. I do not have anything to add.

DPP

Appeal is opposed.

Appellant was convicted for robbery with violence contrary to section 296 (2) of Penal Code and gang rape contrary to section 10 of the Sexual Offences Act and sentenced to serve 30 and 15 years respectively in count I and II and sentences to run concurrently from 25/1/2018.

PW1, the complainant herein testified that she was in her house alone on the night of 19/4/2016 as her children had gone to visit their grandparents and the husband was away at work.

They had a kiosk at their home. On that material day she locked the kiosk and took supper in the hotel which was separate from their main house. She had locked the kitchen and went to the main house which she also locked and went to the bedroom. She had a torch and a lamp and she went to sleep after calling her children and her husband and placed the phone on the table.

In the middle of the night while asleep, she was woken up when someone hit her with a piece of wood on the forehead. Her lamp was still on she had not put it off. There were two assailants in the room. One of the assailants strangled her and the other told her to switch off the lamp which she did. One of the assailants sat on her on the bed while the other went around the house reflecting the torch that she had. When the complainant tried to scream, the one with torch poured petrol on her and threatened to burn her. He then demanded the kiosk key from her and he came back with some items. When he came back with the items, the one who was sitting on her started to rape her while the one who had come with some items from the shop cut her middle finger. She identified the attacker as the appellant herein. The appellant did not rape her but he watched as the other one raped her while he held a knife which he used to cut her. He is also the one who poured petrol on her.

The man who was raping the complainant demanded her phone. He demanded her phone pin and M-pesa PIN. They transferred 3,200/= from her M-PESA account, 1,000/= from M-Shwari account and also borrowed Ksh.1500/= from M-shwari. The same money was transferred from the complainant's number 0720889753 to phone number 0792637319. When investigations commenced data from Safaricom revealed that the number in which money was transferred to 0792637319 was transferred in the names of Kevin Munyua Mbuthia of ID 2813714. This was Pw2. Pw2 was arrested and he denied being the registered owner of the safaricom number. He stated that he had lost his ID card and had obtained an abstract on 22/2/2016. The handset used for no. 0726373319 was IMEI no. 357258070534170. Further investigation revealed that another Sim card no. 0700040104 had been inserted in the same phone on 20/4/16 after the amount of Ksh.5700/= had been stolen from the phone by withdrawal. The Sim card was registered by ID card no. 29090284. Investigation through Registrar of Persons revealed that the Sim card 0700040104 and the matching ID no. 29090284 belonged to the appellant.

Further investigation on the phone into which the money was transferred from the complainant's phone that is 07926037319 had been used on another handset which was IMEI no. 3595014119790 which was traced to Pw4.

Pw4 testified that the appellant herein had borrowed 500/= from him and left him with a Samsung Galaxy as a security, that he had in turn given the appellant his WIKO phone which was cheaper in price.

This phone (WIKO) no. IMEI 3595014115790 was the same phone used at the time of the robbery.

The phone Samsung Galaxy turned out to be of Pw6 who testified that she had lost it earlier and found it with Pw4. Pw4 told Pw6 that the said phone belonged to the appellant who had given to Pw4 after he lent him 500/=.

Pw4 and Pw6 traced the appellant who said that he had bought the phone from somebody else and the said phone was returned to Pw6.

Pw6, having recovered his phone did not want to pursue the appellant further.

Appellant was positively identified by Pw1, Pw3, Pw4 and Pw6. Pw3 was the assistant chief Athinai sub-location. He assisted the arrest of Pw4 who he knew well. The phone of PW4 no. 0792637319 **remains** under investigation. Pw4 stated that the appellant herein was his neighbor and that is how he led Pw3 to the appellant. They went to the house of the appellant and found 2 men. He asked for the owner of house, who is PW2. One of them said owner of the house worked at Athinai Secondary School. One of the man volunteered to take Pw3 who was the assistant chief to Athinai secondary school where they claimed the owner of the house worked.

PW3 believed the owner of the house was the appellant as he had been led to the home by Pw4.

He boarded a motor cycle with one of the men in the house and the said man was the one riding the motorcycle. On reaching the said school, the said man failed to stop and bypassed the school. Pw3 enquired why they had passed the school and that is when the rider identified himself as Kevin Lopenyo the appellant herein.

Pw3 did not know the appellant before. Appellant told P3 that he was aware that he had arrested Pw4 and he was looking for the

appellant.

He drove the motorcycle very fast and told Pw3 that he could take him where he wanted.

Appellant reached a sharp corner and slowed down. It was when Pw3 managed to ump fearing that his life was in danger. The appellant did not stop but he proceeded and disappeared.

Pw3 called DCIO Mogotio to come to his rescue.

Pw5 was a clinical officer who examined the complainant. On examination the complainant pant had thick whitish discharge with blood stains. She had a swelling on the fore-head and a cut on the middle finger of the right hand.

On high vaginal swab, there was blood cells, pus cells and spermatozoa. On urinalysis, the urine had blood stains, pregnancy was positive. The pregnancy was not as result of the rape as she was 3 weeks pregnant at the time of the rape. Pw5 concluded that the complainant had been raped and classified the injury as Grievous harm.

All the ingredients of robbery with violence were proved by the prosecution. The phone that the money was transferred to, after it was stolen from the complainant, was linked to the appellant. The appellant was in the company of another who was not arrested. Evidence shows that he held knife which he used to injure the complainant.

Evidence shows that the assailants were armed with a piece of wood which they used to hit the complainant on the fore ahead. The injuries sustained are corroborated by that of Pw5. Although the appellant did not rape the complainant, he watched while the other was raping her while holding a knife. He poured petrol and threatened to burn the complainant. He was therefore an accomplice in the offence and he also contributed to the rape. The evidence against the appellant is overwhelming.

The sentence of 30 and 15 years meted on the appellant are not the maximum sentences for the two offences. We submit that the 2 are lenient and ask the court to allow the appellant to serve his sentence for deterrence.

Appellant

The phone WIKO was recovered from Pw4. He testified and gave different serial numbers for the phone. On the data the WIKO phone is not shown. Pw2 said he lost his identity card. The Abstract that he produced showed that the abstract was not stamped.”

Duty of the First Appellate Court

[7] The court is mindful of its duty as a first appellate court to re-evaluate the evidence before the trial court and to make its own findings on the facts before considering whether the conclusion of the trial court is to be upheld, allowance being had of the fact that the appellate court has unlike the trial court not observed the witnesses testifying before the court. See **Okeno v. R** [1972] EA 32.

Issues for determination

[8] The issues arising for determination from the grounds of the appeal and submissions by the parties are –

1. Whether the charge was duplex and or whether there was misjoinder of charges.
2. Whether the offences of robbery with violence and gang rape were proved.
3. Whether the appellant was properly identified as one of the assailants.

[9] The question of Admissibility of certain evidence by way of named exhibits shall be examined at the outset before delving, if at all, into the quality of the evidence and its cogency in meeting the requisite standard of proof.

Determination

Duplex charge/ misjoinder of charges

[10] At the outset, the charge in count no. I may appear duplex because it charges two offences in the same – that of simple robbery under section 295 of the Penal Code and that of robbery with violence under section 296 (2) of the Penal Code as follows:

“Count I: Robbery with violence contrary to section 295 as read with 296(2) of the Penal Code.”

[11] However, the particulars of the offence show that the offence alleged to have been committed by the appellant was the offence of robbery with violence under section 296(2) in view of the allegation being more than one person involved and the beating and raping of the complainant as follows:

“Kevin Lopeiyo Lolum: On the night of the 19th day April 2016, at Mogotio Township in Mogotio sub-County within Baringo

County you and others not before the court jointly robbed Joy Ruto of her mobile phone make Nokia Asha 200, valued at ksh.9,500/-, Ksh.700 in cash, 5 packets of wheat flour valued at ksh.700/-, two packets cakes valued at 200/- , two bar soaps valued at 240/-, half dozen of tea leaves valued at ksh.250/- and Ksh.5,600/- forcibly transferred through MPESA from her mobile number no.0720889753 to mobile number 0792637319 all valued as Ksh.17,190/- and at the time of such robbery **beat and raped the said Joy Ruto.**

[12] In addition the statement of the offence clearly states it as **robbery with violence**, and only the provision of law is incorrect in joining section 295 of the definition of simple robbery. The correct statement of the offence should therefore have been “*robbery with violence contrary to section 296(2) of the Penal Code.*” I respectfully consider, however, that the particulars of the charge are clear that the offence charge is robbery with violence and not simple robbery. The error in citing section 295 of the Penal as the provision under which “*read together with section 296(2)*” were brought may be cured in view of the very clear particulars under section 382 of the Criminal Procedure Code because of the object of section 134 thereof to communicate to the offence for which the accused is charged is clear achieved. I do not find the charge bad for duplicity.

Admissibility of evidence

[13] The question of admissibility of evidence may also conveniently be dealt with at the beginning so that further consideration of the evidence is confined to admissible evidence only. The electronic data obtained by the Investigating Officer from mobile service provider Safaricom could only be admitted when produced in accordance with section 106A and relevant parts of 106B of the Evidence Act as follows:

“**106A** . Section **106B** to apply in proof of electronic records

The contents of electronic records may be proved in accordance with the provisions of [section 106B](#).

[[Act No. 1 of 2009](#), s. 36.]

106B. Admissibility of electronic records

(1) Notwithstanding anything contained in this Act, **any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”)** shall be deemed to be also a document, **if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.**

In addition subsection 4 of section 106B requires a certificate by the maker of electronic record as follows:

“(4) 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 subsection (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 subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

[14] The evidence as to the mobile phone data was not adduced by an appropriate officer from the relevant mobile service provider, **Safaricom Limited**, and there was not produced any certificate in terms of section 106B of the Evidence Act, and, therefore, the electronic record contained in the mobile phone record data is inadmissible for production by the Investigation Officer.

[15] However, evidence surrounding the investigations conducted by the police may be given as well as that of witnesses who were interrogated or investigated by the police in the follow up on the phone data investigation.

[16] Printouts from Safaricom Mobile service provider on the mobile-phone based transactions, while welcome and useful, are not the only way of proving commission of an offence related to use of mobile phone. As held by the Court of Appeal in **Kassim Ali v. Republic** [2006] eKLR which considered the issue of lack of medical evidence in the context of sexual offence of rape and held that:

“*Moreover, as the superior court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see **Ongweya v. Republic** [1964] EA 129.*

So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.?

By analogy, mobile phone transactions involved in theft as here need not only be proved by presentation of mobile data extracts from the service provider but also from circumstantial evidence by the oral testimony of the complainant and other witnesses in the course of investigations into the offence.

[17] Although the Investigation Officer could not lawfully produce the electronic data contained in the Safaricom printouts, the information obtained by him and evidence adduced by other witnesses secured during his investigations may properly be produced and considered in establishing whether the offences alleged by the Prosecution are proved.

Analysis of evidence

Proof of the offences of robbery with violence and gang rape

[18] The Evidence before the trial court

PW1 Joy Rutto

I come from Mogotio and I am a teacher at Emining Boys High School. On 19th April, 2016 I was at my home alone as my children had visited their grandparents and my house girl was on leave. At home there is kiosk and it was on a Tuesday and in the evening I was expecting my husband to come and I called him and he said he will not come as he was to go for job very early and I prepared supper and I decided to eat in the kitchen which is a separate house from the main house. I then took supper around 8:30 pm in the kitchen and I then locked kitchen and I had a hurricane lamp and spot light hence locked kitchen and I took the lamp and torch to the main house which I locked and entered bedroom and secured with the lower and upper latches/locks. I then called home to confirm how children were and I talked with my husband for a while and it was around 9:30 pm and I completed talking with him while inside the bed and wanting to put phone beside the table and I had not put off lights and I just heard being hit on the forehead with a piece of wood which was besides the house and another strangled me on the neck and I heard one voice tell me to switch off the lights and I switched off the lamp. One of them sat on me on the bed and another was going round with my torch to reflect and I could tell they were two and the one who sat on me asked why I had talked for long on phone as if I had money and I told them I had no money. Then they hit me my phone fell down and separated in parts. I told the person I had no money and that I only had 3,000/- immediately they hit me they poured petrol on me and I could tell by the smell and I tried to scream and it was raining and one of them poured on me and I decided to keep quiet and one sat on me while other pouring petrol on me one asked me of my phone Pin and wanted to know money in my Mpesa and Mshwari and I told them the PINs and that I had Kshs.3,200 in Mpesa and was not sure of exact money and that in Mshwari I had Kshs.1000 one of them asked if I had any other money in the house and one going round searching clothes and searching and searching in bag, demanded for the key to the kiosk and I told them where key was and one went to open while the other one was still sat on me and whenever I tried to look he could hit me on the head with his fist. The other who went to shop came and showed me items he took from the shop among them scones and the other we confirmed later and saw the missing items among them tea leaves, 2 bar soaps, cost Kshs.700, unga ngano half bundle of 1kg each (6 pieces) and when the other returned the one who had sat on me started to rape me as the one standing with a knife was looking at us and I could identify him positively as he was tall and not very dark with a green with white sports sweaters and was the one going round in the house and showed me items he took from the house and is the one who had a torch as the lights from the torch were sufficient. I could not identify well the person who raped me as he kept beating me if I tried to look at him and he kept raping me and he was heavy. They took my phone away after raping me they asked if I had any other money and I told them no and the other person did not rape me. The accused in court is the one who was having torch and cut me on middle finger with a knife and I could see his face well and they then told me I sleep and face away from door and I face the wall and the accused herein told me I be locking the door and he asked me of my husband's name I told him he is called Kevin and he wanted to beat me asking of the name again and I did not tell the relation with the names. After they left I rushed to lock the house and I was in fear and tried to look for help and there was also moon light and I feared they might come back to the house and I then went outside through fence and I went to my neighbor my aunt namely Miriam Cheruiyot and I woke her up after which we called my husband using her phone and my husband called his brothers at home as he was in Marigat and his friend in Mogotio who arrived and he also arrived later and he then went back to my house then we went to police at Mogotio and we reported and I was given note to go to Mogotio District Hospital where I was treated and issued treatment card MFI – 1 and on arrival at hospital around 11:00 pm to 12:00 am the nurse gave me panadol saying to return following day while doctor was around and I was then examined and treated and I had urine test and found I was expectant and was traced and HIV test was also done and I was given the P3 form – MFI 2.

We went back to station the following day and I was issued with P3 form MFI-3 which was duly filled by doctor on 21st April, 2016. While at the Police we were asked to go to Safaricom – Nakuru as we told to block the number as we were advised after calling customer care and told that my ID number and details were not clear. We then went to Nakuru Safaricom when I gave out my details and told transaction was done around 11:49 on 19th April 2016 where Mpesa was transferred from my phone 0720889753 and sent to a number I do not recall an amount of Kshs.5,600 saying they borrowed Kshs.1500 from M-shwari and added another Kshs.1000 in M-shwari and added Kshs.3,200 in my M-pesa hence sent total Kshs.5,600 to their phone.

We then returned home. I had given them my PIN for the Simcard and for mpesa when they attacked me and it was the one who sat on me who asked for my PIN.

The police then did investigations and after a while one of them was arrested and I went to identify him at Mogotio Police Station and there was no identification parade but was the only arrested and I could identify him from the looks as I saw him in the house.

My phone taken was a NOKIA Asha 200L I bought at Kshs.9,400. When I went back to kiosk I noticed items stolen were Kshs.700, tea leaves 1 dozen, Ex flour half dozen, scones of Kshs.200, 2 bar soaps. While the other one was raping me accused was standing

beside a knife as he did not attempt to rape me and they then left. The two were arrested and its accused who had a knife and they recovered pieces of wood and I could not tell at first who had the timber exactly when they poured petrol on my clothes andthey said if I scream they will burn me. I later recorded my statement with the Police and I had never seen the accused before.

Cross examination by accused

I had never seen you before and I could identify you as you never hid your face from me and was walking around and later arrested after around two months and I came to identify you without the parade and I identified you because I had seen your face before. You are the one who cut me with the knife and you had a torch hence enough light in the house and torch was very sharp I recorded in my statement in 1st page, paragraph 2 on how I identified the suspect from the face, jumper and hairstyle. We were told the mobile number money was transferred to read Kevin Munywa Mbuthia and in fact Kevin Munywa Mbuthia was arrested and said his ID got lost and robbers were using it and Kevin Munywa had a case concerning motor bike and all the money was to that name and police confirmed that.

When you were arrested none of the stolen items were found with you due to lapse of time. I could not identify the one who sat on me because when I tried to look at him he would hit me while you were walking round the house.

Re-examination

I could identify the suspect herein as he had the torch on and was not hiding his face and walking around and I was sat facing aside the side accused herein was walking and other was besides me and could not turn to him. The batteries in the torch were still new hence could reflect well.

PW2 Kevin Mbuthia Munywa

I come from Mogotio and operate a hotel. I had been arrested by CID – Mogotio on a date I cannot recall but they took up to Mogotio Police Station while at my home and told me I was involved in rape case and transferred Kshs.5,500 while using a certain number registered in my names. That transaction was from a woman who had been raped (PW1) to the cell phone which registered in names Kevin Mbuthia Munywa is myself and the line money was sent to starting with 0792 was not my number and it was No.0792637319 which is not my registered line.

I had lost my identity card last year and I reported to Police and I was issued with abstract. The ID had been taken from my house as it was missing when I looked for it and was together with NHIF and NSSF cards inside a wallet and all missing.

I have copy of abstract. Abstract – MFI 4 reported on 22.02.2016.

I have my original ID 28137144 which had not been replaced upon my arrest. I reside next to the Police and that in fact that line was still on while yet I was in custody and that the officers were in fact getting in touch with the person who was using that line. My cell phone had been confiscated and its No.0717888607. I have never registered the cell phone No.0792637319 and as such I did not know that number.

After investigations and tracking that number they said they had found the person using that number as they had dealt with Safaricom. Hence I was released.

Cross examination by accused

The line alleged registered in my names I did not know who had it and when you were arrested I was shown it was you who had registered in my names. I do not know exact date I lost my ID. I was told accused was arrested and that he broke his phone which was evidence and I do not know how true it was. I reported immediately to Police on loss of ID as per abstract dated 22.02.2016. From date I lost ID to date of alleged offence I was arrested after a week for investigations on alleged theft of motorbikes and CID were investigating. The DCIO told me you were arrested and you damaged the phone but I do not know the truth.

Re-examination

I was first arrested on a month I cannot recall and could have been two months after loss of my ID.

PW3 William Nguyo

Assistant Chief Athinai Sub-Location. On 10th May, 2016 I do recall when DCIO – Mogotio visited me while with his colleagues at 10:30 am and needed me to assist them with information of some two theft suspects and gave me one name of suspect as Daniel Kinda whom I used to know very well and I accompanied them to home of Kinda where he was arrested and escorted him to DCIO office and he was interrogated on a phone which had been used to transact Mpesa and DCIO informed me the money the suspects had robbed home of Joy Rutto where they had robbed her and raped her and money had been sent to that phone.

Kinda said he had been given the phone by Kevin Lopiyo Lolim who was his neighbor and their houses faced each other and since I never used to know Kevin before I advised DCIO I go to Athinai to that plot to do investigation and to inform him later. I went to the house and I interrogated them on who the house belonged to and the person gave me feedback said the owner was not around but worked in Athinai Secondary but later I learnt the person who gave me feedback was Kevin Lolim. They had a motorbike outside

the house and I asked them to take me to Athinai Secondary School and Kevin told me it was not his but for his friend one Bonkei whom I knew and he was at ten metres away and Bonkei agreed Kevin to take me to school with the motor bike and we proceeded to Athinai Secondary School and on reaching the gate of the school, Kevin did not stop but proceeded and increased speed of motor bike and changed route to a rough road towards Sorombei and he diverted and on asking why he passed the School he told me he knew I am Assistant Chief Athinai and that he knew I had gone to his home with intentions to arrest him and that in fact he had seen us with DCIO when we had gone to arrest Daniel Kinda and that intended to arrest him and that he will not stop and take me to where he wanted. He infact told me at that time he was Kevin Lopiyo and that he knew we had arrested his partner. I then removed my phone and called DCIO – Mogotio and told him I was headed to Sorombei road and accused was over speeding and that I feared we could get into an accident. When we arrived at Rongai river Kevin reduced speed as there was a sharp corner and I then jumped from motorbike and fell down and he did not stop but proceeded speeding towards Sarambei and later after around five minutes DCIO – Mogotio arrived with his land cruiser and we tried to chase Kevin but did not get him hence returned to Mogotio.

Later I was called by DCIO – Mogotio informing me they had arrested Kevin and that I go identify if he was the one who had carried me with motorbike and it was towards end of June, 2016.

I then went to the station and the cells were opened for me and I managed to identify accused positively and he is the one at the dock (points out) he was later charged but denied charges.

DCIO informed me Kinda was to be a prosecution witness as per his investigations as his phone had been used without his knowledge.

Cross examination by accused

I am Assistant Chief Athinai Sub-Location and I do not know all residents. I recorded my statement after your arrest and I had known your name after Daniel Kinda mentioned you. Daniel Kinda on being interrogated [said] the phone he had received from you. I found you that date at Athinai and I do not know if you resided at Athinai and it was Kinda who said you lived next to home and I learn it was yours as when you took me to Sarambei you said you were Kevin Lolim and you fled away. I did not leave AP officers and I was first coming to investigate if Kevin was at the station. I identified you as when you carried me I could not forget as you had carried me. There was an officer who opened cells for me. I did not know how long you were in the cells. I know your parents reside in Maji Mingi and I found you at Athinai. I am not aware the kind of phone that was being investigated as same is not in court.

Re-examination

I learnt accused live in Athinai as per interrogation of Daniel Kinda and when I went there I found accused with another person at Athinai State village. I knew accused's name as they had mentioned at DCIO's office and I had gone to investigate at the plot and out of the two accused while taking me towards Athinai School and he personally told me he was Kevin Lolim.

PW1 recalled and reminded still on oath and further cross examined by accused

I recorded first statement and a further statement. I first recorded statement around 22.04.2016 and further one when I went to identify the accused when he was arrested. I do think I injured the left hand but the treatment chits can confirm as its been long. I first reported same night and I did not report on stolen items immediately but I checked the shop the following day and confirmed the stolen items. I identified one person well on same night and I described in my first report and its not in first report but in my statement and I said the looks of the suspect and height, not very tall and the sweater he wore which was green with white spots and the fact that he was going round the room. I did not find you wearing it at time of arrest.

No identification parade was done and I managed to identify you as I saw your face well from time of incident. The money stolen was not cash but you asked for Mpesa PIN which you crammed and after you had a biro which was not writing and the Mpesa was Kshs.3100 and Mshwari savings was Kshs.1000 and you borrowed Mshwari loan Kshs.1500.

As per first report I recorded Mpesa had Kshs.3040 and I was really tortured and I could not recall exact amount. I did not lead Police to arrest you and investigations were done by CID.

Re-examination

I recorded two statements to the Police, first around two days after offence and at that time the accused had not been arrested and a further one was months after arrest of the accused and it was after I identified him. On material night two people entered my house and I identified Kevin Lolim and I saw his face well and was tall and wearing green sweater with white spots and was fair in complexion and the other one had a Kikuyu accent and was a stronger and seemed more body built. In total I lost Kshs.5,600 and Mpesa alone was above Kshs.3000.

PW4 Daniel Omondi Kinda

I come from Athinai and I am a clothes vendor. In April 2016 I do recall on unknown date when one Baba Sonko came to my home to borrow Kshs.500 and I was not well known to him and said he gives me his phone as security till he returns the phone. I then gave him Kshs.500 and he gave me phone make Samsung Galaxy trend model 500 and I returned the phone and he then told me I give him my WIKO CE 700 phone to use in the meantime as it was extra and since I had my phone which was a Samsung Galaxy and had gotten spoilt, and I was yet to take to repair, I decided to change and make use of the phone he had left me as security and I took the phone to charge at my sister's place called Emily and the husband Kimeli came and told me that the phone looked similar and said

it was for his friend namely Billy and I asked him to call Billy so we confirm and Billy came the next day to my sister's place and confirmed the phone was his and he is one Billy Sadala and I told him as he claimed the same is his, I then called the person who had left the phone with me and it then called Baba Sonko whose phone was off and postponed to the next day and was still not reachable and on following day while Baba Sonko was walking with two others I called him and met at my sister's place and I called Billy whom they talked with aside and he refunded me Kshs.500 and returned my WIKO cell phone and I gave the Samsung phone to Billy.

The WIKO CE 700 I had IMEI 353595 074115793 – MFI 6 given Baba is the one in court (identified)

Billy said he had lost his phone and did not give further details and how he lost it.

After one week, two days on a Tuesday Chief Nfuyo, Athinai Location came to where I was staying there were people working for me and didn't give me reasons and I was resting at my sister's place and did not mention who the people were. I accompanied Chief to my house around 400 metres away and entered my house and I switched on the lights and they asked for my ID number (by the CID Shirandula and CID Otieno) and I gave them my ID number and they asked for the phone I had and I gave them the WIKO phone and they informed me I had been involved in a serious crime of robbery with violence and rape.

I gave them my ID which is number 30877308 and they escorted me to the Police Station and while there they asked me who is Kelvin Lolim and I was shocked as I did not know who he was and they said my phone was used in forceable Mpesa transfer from one Joy to second to my phone through Mpesa and I only told them I knew I had given my phone to one Baba Sonko and I informed them who usually walked with Baba Sonko and after that the Chief recognized one person who used to walk around with Baba Sonko and they returned later and told me Kevin Lolim and one Bonke had escaped. I was in Police custody for three weeks then Court released me after investigations that I was not to be charged. I do not know exact date my phone was used to commit offence but it was at period I had given out. It was at time of my arrest that I learnt Baba Sonko was known as Kelvin Lolim and I never went to see him at Police Station and I later recorded my statements. The accused in court (points out) is the one I used to know as Baba Sonko and is the one who borrowed my phone and I learnt that he is known as Kelvin Lolim.

Cross examination by accused

I do not do money lending business. When you came with a phone I gave you Kshs.500 and it was you told me your wife was expectant and child was sick hence needed the money and I never used to know you well. My WIKO phone was cheaper than the Galaxy trend for around Kshs.12,000 yet WIKO was around Kshs.1000 hence the reason I gave you the WIKO phone to use. I indicated in my statement that I gave a handset and did not specify its WIKO. I have receipt for the WIKO phone but not in court. The officers never used to know Kevin Lolim after I told them I had given you my phone during that period. I did not come to identify you to Police upon arrest as I was away in Migori. Cannot recall exact date I recorded statement admits indicated on 14th May, 2016 (referred) as I do not know dated you were arrested. I do not recall date I gave you the phone and I was not shown any date and it was during period of alleged offence I am not a drunkard and I have friends but do not use my phone and I called you once using the WIKO phone while solving the issue of Billy's Samsung phone.

The IMEI No. for MFI – 6 is No.353595074115763

As per OB at the time of my arrest. I was found with a phone and it indicated **IMEI No.35359507411793** reads.

Re-examination

At time of my arrest I only had the WIKO phone and phone is **IMEI No.353595074115793**.

PW5 Winrose Kigen

I come from Mogotio and I am a Clinical Officer – Mogotio Sub-County Hospital. I have a P3 form for Joy Rutto Jerono whom I examined and it's Reference No. 2042/16 who complained of being raped and assaulted by two people who had sneaked into her house and without her consent. On examination and state of clothing, there was thick whitish discharge and blood stains on her pink pant. She was not under any influence of alcohol or drugs.

On head and neck there was swelling on forehead with tenderness upper limbs there was a cut on middle finger of right hand.

On physical state of genitalia labia minora and majora were normal but white discharge from her vaginal with blood stains. On high vaginal swab there was blood cells, pus cells and spermatozoa. In urinalysis, urine was turbid (heavy with blood stain)s. on pregnancy test she was positive. Approximate age of injury was 15 hours and probable weapon was sharp and blunt object degree of injury was grievous harm.

As per Section 5 of P3 form I formed opinion that complainant was raped due to spermatozoa presence and red blood cells presence and pus presence. The pregnancy was not due to rape as last menstrual period was on 13th March, 2016 and as such was about three weeks expectant. I filled P3 form on 21st April, 2016 and signed and wish to produce as exhibit – pexh3.

I relied on treatment chit and PRC form in filling P3 form. The treatment chit was from our facility and she was attended to on 20th April, 2016 and she further came back and 25th April, 2016 to refill her drugs and complained she had expected the foetus on 11th May, 2016 and wish to produce the treatment card MFI – 1 as pexb – 1. I have the PRC form – MFI 2 all contents are consistent with treatment chit and P3 form and wish to produce as pexb 2.

Cross examination by accused

I examined her after 15 hours of alleged offence and pus cells was out of offence and pus cells can be traced immediately after offence. We referred her to Police station to surrender her clothes and she said she knew the perpetrator. The accused was not brought to hospital for examination. She came to hospital on 20th April, 2016 and had injuries on face, cut on finger and sperms presence and pus and blood to her private parts.

Re-examination

Nil.

PW6 Billy Kiptanui Sadala

I come from Mogotio and I am a motorbike rider. In March, 2016 I was at my work place from Mogotio and went to purchase airtime at a certain shop and since there had been a blackout in Mogotio, and forgot my phone on the counter as I left the shop yet I had the credit card and I went back to the shop to ask of my phone and the owner said he had [not] seen it and I went back after five minutes. Later I then went to replace my line and I was having a Samsung make trend plus black back cover.

On 23rd April, 2016 my friend Kimeli told me while at Mogotio stage that there was a phone at Athinai with one Bao which looked like mine and as my friend he used to know my phone well and that he had seen Bao with it and I asked him we go there and I went and met Bao who said one alias Sniper who I later learnt was called Lolim had been with the phone and gave to Bao and that had a debt of Kshs.500 belonging to Bao hence used phone as security. I told Bao not to give out my phone and to look for Sniper. The following day 22nd April, 2016 I came with Kinda to meet Bao who took me to Lolim we met at that area and I asked him where he got the phone and he said a certain girl sold him and showed me her photo in the said phone and I told him its mine and I identified it from back in black cover and I then paid Bao Kshs.500 on behalf of Lolim so I was given my phone. I also sold my phone before I recorded my statement here as I had debts.

The police officer informed me accused's names as Lolim and I had first seen him when I went to ask for my phone and knew him as Sniper and he is the accused in the dock.

Cross examination by accused

As per my statement I stated my phone was lost and I did not say I had left it in the shop. At time of recording statement I had already told the Police the phone had a crack below and hence I could identify it as mine. I only knew you as Sniper as in fact you had been saved on phone as Sniper and had your photo. You gave phone to Bao as security and he informed me of the same I cannot tell if true. It was the first time we met. I later learnt you had been arrested and I had identified you when I met you with Bao (referred to statement) and waiting Bao called Sniper while we were at Bao's place. I cannot recall serial number of the phone but I had given it to the Police as I had recorded it aside and I did not copy the note I had serial numbers and I did not frame numbers and infact he called me recently if I knew serial number verbally and it was at 7:00 pm on 21st April, 2017 through cell No.0780280048. My cell phone number is in the statement hence I suspect you got my contacts there and I could identify your voice from that number and its possible you had a phone in prison and you were known. I did not record your voice I cannot know how prison is conducted and I have no true caller in my phone to show registered contacts I identified my phone as it had a crack on side back cover. I first saw accused before is arrested as the one who had my phone and I had been with Bao and Kimeli and I met him while having my phone on 24.04.2016.

PW7 No. 232989 Inspector Arwings Otieno

I am the in-charge CID-Mogotio. On 27th June, 2016 around 11:00 am I was in the house when I received phone call from one of the informers that accused herein had been seen somewhere.

A report had been made vide OB No.30/19/4/2016 of robbery and complainant was robbed, raped and Kshs.5600 was transferred from NO.0720889753 to 0779263719. The informer had told us how he was dressed and together with my colleague PC Muthinja went to one of the local bars namely Kericho within Mogotio and on arrival found and arrested him while he sat with around four others and we had infact been given the exact position he sat and that he had worn a cap covering his face, sat at a corner and with a green jacket while the four others were beside him.

We struggled to arrest him as he was resisting arrest and we sought help hence managed to arrest and escort him to the vehicle and to the Station where we preferred the charges herein.

CPL Shirandula was investigating the matter and had already completed and I was basically the arresting officer and the accused is known as Kevin Lolim and I never used to know him before that date and he is the accused on the dock.

Cross examination by accused

I recorded my statement on 16th May, 2017 and you were arrested on 27th June, 2016 and it's not a mistake to record a statement late and it's not an afterthought and the reasons recorded is because of the arresting officer PC Muthinja went to transfer to Meru. I got your description form one informer whom I cannot name. When we tried to arrest you, you dropped the cap and when we held the jacket and you recovered it and you pushed us up to outside and tried to run away hence I held your belt on the trouser. It's not an offence to record statement late. It's a lie that you were not wearing a cap as it fell down as we tried to arrest you and we were

also shielding my gun as you tried to disarm us. We arrested you around 11:00 pm and it was on 27th June, 2016 and was arraigned in court on 28th June, 2016 the following day.

Re-examination

I recorded my statement late and I was personally at the scene and made arrests together with my colleague PC Muthinja and I recorded late as PC Muthinja was transferred to Meru as initially he was to testify and my evidence is true.

PW8 No. 48678 Cpl. Laban Shirandula

Attached Mogotio Sub-County CID on crime duties. I am the investigating officer herein on 22nd April, 2016 I was in the office when I was given a case being investigated by PC Adupu at Mogotio Police Station and was a case of Robbery with Violence and rape and had been reported by Joy Rutto who is for her statements, that on night of 19th April, 2016 while in her house and after talking with her husband on phone and while getting ready to sleep, two men came from below the bed and told her not to make noise or else they will injure and demanded from her money and forced her to give her mpesa PIN for her cell number 0720889753 and she gave them the PIN number and while using it transfer Kshs.5,600 from her phone to cell phone No.0792637319 after which they gang raped her.

On 28th April, 2016 I came to court and pray for court order to investigate cell no.0792637319 and I have copy of the order to serve Safaricom and I have the application in court order therein dated 27th April, 2016 MFI 7 (a) and (b) respectively – pex b7.

Upon obtaining order I served Safaricom and they gave me Mpesa print of that date on that cell phone and it shows money was sent from 0720889753 Jerono Joy on 19th April, 2016 to 0792637319 and shows where money was withdrawn the following day 10th April, 2016 at Agent till No.356074 registered as Safe World Tel.ludan enterprise near Kibelion pub – Mogotio it was withdrawn on 20th April, 2016 at 9:20 am and Kshs.5600 was withdrawn. The amount sent on 19th April, 2016 was Kshs.5,600 at 2318 hours. I wish to produce the mpesa statement as exhibit MFI 8 – Pexb 8.

The identity card used to register that line No.0792637319 was Kevin Mbuthia Munywa ID No.28137144. Kevin Mbuthia whom I looked for gave me Police abstract after he had reported of loss of his National Identity Card as he resided next to Mogotio Police Station and I recorded his statement and denied registering that SIM card and gave me the Police abstract and had made report on 22nd February, 2016 at Mogotio Police Station OB.14/22/2/2016 and complainant of loss of his ID number 28137144. He also gave me a copy of his ID he got as a replacement.

The said Kevin Mbuthia came to testify in court.

- The Police abstract MFI 14 – pexb 4
- Copy of National identity card.
- MFI 5 of Kevin Mbuthia Munywa ID No.28137144 issued on the 23rd July, 2016 and place of issue is Mogotio. He never found the ID he had lost and I wish to produce MFI 5 – pexb5.

On further investigations at Safaricom I called for IMEI No. of phone used at the time of offence and was for handset fitted with SIM card that received Kshs.5,600 and also used to withdraw the Kshs.5,600 and used in 092637319.

I got that handset used was **IMEI No.357258070534170 registered in names Kelvin Munywa**. I also got the identity card used to register that SIM card and was No.29090284. I did investigate from registrar of persons and addressed him on 23rd June, 2016 requesting to know the registered owner of that identity card number. I got reply showing the owner of that identity card was Kevin Lopeyo Lolim. I also got a printout from Safaricom to know if any handset had been used with SIM card No.0792637319. After withdrawal of money the cell phone number charged immediately to 070040104 from 0792637319 and registered owner of 070040104 was Kevin Lopeyo Lolim and was used in the same handset which IMEI I have read above. **The change of SIM card was on 20th April, 2016 at 10:50 am yet withdrawal of Kshs.5,500 was done on 20th April, 2016 at 9:20 am which change was done after 30 minutes and IMEI No. recorded 357258070534170.**

As per Safaricom the line used to receive money was only used to withdraw Mpesa. The statement of IMEI number was up to the date of 20th April 2016 at same time changes occurred.

As per statement the accused continued using his registered line Kevin Lolim and he continued receiving calls and texts and had been transacted 20 times.

I wish to produce letter to registrar of persons and its response – MFI 9 (a) and (b) respectively dated 23rd June, 2016 as Pexb 9 (a) and (b).

- Safaricom printout showing IMEI number and cell phone No.0792637319 and change to cell phone No.070040104
- MFI 10 – pexb 10

- I also investigated to know if any other handset had been used on the cell phone that received money from complainant i.e cell phone No.0792637319 and I got one IMEI No.3595074115790 which was handset belonging to Omondi Kinda whom I traced and told me that on unknown date but within that period he had given this phone to the accused after he borrowed Kshs.500 from him and was given a small phone by Omondi Kinda and accused gave him a superior phone as security and when he refunds the money Okinda will return the phone to accused. He was given the cheaper phone so accused to use in making calls and as such that line 0792637319 was ever used in the cheaper phone give to accused and as per statement that it was used by accused. When we went to look for Omondi Kinda and got this cheaper phone, the area Chief identified the accused and pleaded to take him to hospital so as we manage to arrest him but he instead went on an opposite ditch with Chief on motorbike and tried him away at sisal area.

Accused used Okinda's phone from 6th April, 2016 and which date I note was when the SIM card was used and the approximate date he had given that phone to accused returned the WIKO phone to Okinda and Okinda in turn returned accused's phone and was witnessed by Sadala.

The identify card for Kevin Mbutia was used to register to receive and withdraw that money and the registration was done by the accused. After investigation I concluded the offence herein was committed by accused and was arrested by DCIO CPL Muthinja and colleague on 27th June, 2016 and was found at Kericho bar in Mogotio town.

On material date of offence her assorted shop items were stolen, a handset make NOKIA of Kshs.9,500 cash Kshs.700, 5 packets of wheat flour, a Kshs.700, 2 pieces of cakes of Kshs.200, 2 bar soaps of Kshs.240, ½ dozen tea leaves of Kshs.250 and Kshs.5,600 transferred from her phone and total cost lost Kshs.17,190.

The complainant did identify the accused as per her statement as she described him. Identification parade was not done as when accused was arrested her family members were around and had already seen him. As per description she had given it relates to the accused herein. She had described him as tall and of fair complexion as she infact pointed out to the accused as the one who was the tall one among the two. We did not find accused with any of the stolen items.

We have never arrested the second suspect and still search for him.

- I wish to produce the WIKO – MFI 6 phone pexb 6.
- Safaricom statement showing use of the WIKO phone – MFI 1 – pexb I 1.

The complainant had already been treated and examined in relation to the gang rape and treatment notes and P3 form were produced. As per statement of complainant there were two suspects who threatened to kill her and beat her up and were not arrested. I recorded my statements and the accused is the one in court (points out).

Cross examination by accused

We did not get the cell phone you used to withdrawn hence cannot tell exact make. I did not investigate phone of complainant to get IMEI number. I was not around while you were arrested and infact community was looking for you. We used informers to look for you and was around 9:00 pm when you were arrested in the bar with lights on. There was no need for identification parade as complainant had seen you. The WIKO phone connects you in the line that had been used to transfer of the money was ever used in the WIKO phone and infact you used it. You were not found with the WIKO phone nor SIM card. The WIKO phone was found with Omondi Kinda and the WIKO phone was not used to withdraw the money. I do not work with Safaricom but as investigator I got evidence from print out which I can produce on their behalf. The data on date from Safaricom were printed out before you were arrested. You never requested me for the data. The covering report is meant for the prosecutor and not you as an accused and I do not know how you obtained it. Kevin Mbutia lost his ID and was issued with Police abstract on 22nd February, 2016 OB. No.14 the data I got was in relation to withdrawal and between the 19th and 20th April, 2016 being date of transfer and withdrawal.

I swore affidavit to obtain court order to investigate the cell phone numbers and in my affidavit paragraph 4 quoted 0720889753 to assailant's number 0792637319 and you are having copies of investigation diary which are for my own investigation and not for consumption of accused.

WIKO serial No. is 353593074115793.

As per complainants first report she did not as per entry state if she had identified the assailants. Statement is more detailed that's just report and identity might not have been captured. As per first report complainant said phone had 3040? – and in Mshwari Kshs.1,140 and went away with cash money Kshs.500 in her bag and unknown sum of money at kiosk. The amount in phone would be 4,180/- but transfer of cash is real and shown in the statement and at first report she would have been confused on exact amount.

Re-examination by accused

As per first report Kshs.3,040 and Mshwari 1140/-. However, as per investigations Kshs.5,600 was transferred from her cell phone and the difference could be out of state of confusion during first report.”

“DW1 Kevin Lopeyo Lolim

I come from Majani Mingi in Rongai Constituency. I was working at the Sisal Estate. The charges in court are false as I was arrested on 26th June, 2016 when at Majani Mingi area at 3:00 pm and I was coming from work and I arrived at my home where I found my sister who said there were people who had come looking for me and I asked who they were and said I go to Mogotio and had left them cell phone number and I called that number and informed by receptionist that it was an officer namely Wambua and that I go to Mogotio at Kilelwa pub and when I came up to the pub he told me to go to Kericho bar and it was already 6:00 pm and on arrival at Kericho bar I met two people and I do not know one of them and said he was Wambua and asked me of his names and I told them I was Kevin Lopeyo Lolim and they asked me if my ID card they took me to Mogotio Police Station at 6:00 pm and I found DCIO who said I had committed a crime and I told them I was not aware as I came from Majani Mingi and they said I usually come to Mogotio at 6:00 pm and they returned to Kericho bar and put me aside as they drink and waited for anyone to come talk to me. I stayed till 9:00 pm and told her come sit besides me and talked with me and DCIO came suddenly and summoned us asking them if they knew me and they said they had just met me there and they arrested me with those men and taken to Mogotio Police Station and DCIO said I was involved with the offence and I gave him my ID and cell phone make LENOVO and asked me if my cell number which I gave is 0741789369 and they insisted I gave them another number but I told them I did not have. The DCIO the following day took away the other men and after interrogating them were later released and I remanded in custody.

PW3 the Chief came to the cell with Wambua the officer and Chief asked if my names which I told him and asked if I was the one who had made him fall with a motorbike and said I was a boda boda rider and said he had come to my home in Mogotio and I fled away and I told him I never stayed in Mogotio but only came there for salary and Chief told DCIO I was not the one but the DCIO insisted I was the one as per my names.

I was then taken to CID office and fingerprints taken and I know the charges in court are false charges herein which were framed.

PW1 said the person who committed offence she could recognize due to the torch and she said she identified me as the one who raped her and that I was as well holding the torch and she said she had never seen me at Mogotio. The officers who arrested me never went to my home to search and recover any exhibits said to be stolen and I had never committed any offence before.

PW2 said his ID was used and that DCIO said it was the suspect who had used his ID and PW2 was lying as he said he had travelled and left his ID in his house yet he did not report to Police when involved into or of any stolen items. He must have been lying as its hard for one to travel and leave his ID behind.

PW4 said he had given his phone yet the alleged phone he did not mention in his statement and did not give me any and he said had found with the Police at time of arrest. At the OB he gave out a different serial number and the phone brought to court was a different serial number hence its possible PW4 knew offence PW6 said he found his phone with Omondi and the phone he brought to court was not the one he said he took to Omondi yet it was said to have been recovered by Police yet not produced by Investigating Officer. The Investigating Officer brought data alleging my line was used in the transaction and gave out a cell No.070040104 and is for data it was transacted with 0792637319 which he says when withdrawal was done 0700040104 was my registered line. As per data the names are Kevin Lopeyo Lolim. The data produced has no Safaricom stamp to confirm the Investigating Officer obtained them from Safaricom and below at the data printout has names Kirwa and not Safaricom. The Investigating Officer should have brought an official from Safaricom to confirm data originated from them. The Investigating Officer said cell No. 0700040104 was registered with ID No.28137144 and that ID number does not belong to me and the names Kevin Lolim Lolim are in those ID number yet are not my names and there is another ID number in the data ID No.29090284 in names of Kevin Lolim Lolim and its dated 12th July, 2016 throughout paginated.

The money transaction, the Investigating Officer said it was Kshs.5,600 but the complainant gave a different figure that from that of the Investigating Officer and I was not involved with the offence. That's all.

Cross examination by Prosecution

On 19th April, 2016 I did not recall where I was exactly I was as in special occurrence on that day. So I recall however I did not commit the offence. I come from Majani Mingi bordering Rongai and Mogotio I have never lived in Mogotio and I shall not call any witness. And infact I have never been around Athinai in Mogotio. On 10th May, 2016 I do not recall where I was at. The Chief never came to ask me to take him to Athinai. Infact the Chief said before DCIO I was not the one who took him with motorbike and I even cross examined him over the same. I was arrested on 26th June, 2016 at 6:00 pm and I was first taken to Mogotio Police Station then returned to Kericho bar by other officers and I was arrested with other unknown after they came to sit next to me at the bar requesting I buy them miraa and I never used to know them apart from one Mose who was my former schoolmate and I cannot recall others. They were four men who were arrested with me and officers came and cocked the guns asking all of us to lie down and they were not told reason for arrest. At DCIO I was told I had been involved with theft and not as per charges herein. I am Kevin Lopeyo Lolim.

Re-examination

That's close of my case.”

Conclusion

[20] Weighing the evidence presented before the court by the prosecution and the defence as a whole, the prosecution's evidence of the appellant's involvement in the robbery and rape of the complainant herein must be taken to discharge the appellant's *alibi* that he had never

been to Mogotio on the material date or at all.

Proof of the offences of robbery with violence and gang rape

[21] Ingredients of robbery with violence under section 296 (2) of the Penal Code as elaborated in ***Oluoch v. R*** (1985) KLR 549 are theft, while armed with dangerous weapons or in the company of one or more persons or striking, beating or wounding any person the course of the theft. In this case, it was proved by prosecution evidence that there was theft of shop items and mobile money belonging to the complainant was committed by two assailants and in the course of the theft the two attackers beat and wounded and raped the complainant, and the offence of aggravated robbery was complete.

[22] Gang rape is defined under section 10 of the Sexual Offences Act as follows:

“10. Gang rape

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.

[Act No. 7 of 2007, Sch.]”

[23] It matters not that the two attackers did not both rape the complainant; it is sufficient that one of them raped the victim while the other watched or stood guard. In this case, the complainant said that the appellant cut her with a knife and watched while the other attacker raped her. The cutting of the complainant with a knife on her middle finger and standing-by the one attacker while the other raped her shows the common intention to rape the complainant as part of the robbery or as independent offence. Indeed, the rapist only started raping the complainant with the other’s guard as testified by the complainant that “*when the other returned the one who had sat on me started to rape me as the one standing with a knife was looking at us*”. The co-attacker stood guard with a knife while the other raped the complainant. There clearly was a common purpose developed prior to the robbery or in the course of or during the robbery. The joint responsibility of the two attackers is the consequence of the principle of common intention under section 21 of the Penal Code as follows:

“21. Joint offenders in prosecution of common purpose

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

[24] Medical evidence established that the complainant had been beaten and raped. I find the two offences of robbery with violence and gang rape proved.

Identification of the appellant

[25] The court has warned itself of the danger of convicting on the identification evidence of a sole identifying evidence and the court is aware, as counselled in ***Oluoch v. R*** (1985) KLR 549, that:

“It is trite that a fact may be proved by a single witness but when such evidence is in respect of identification it must be tested with the greatest care: Roria v. Republic (1967) EA 583, Abdallah bin Wendo & Anor. (1953) 20 EACA 166 and Benjamin Mugo Mwangi & Anor v. Republic Cri. Appeal No. 100 of 1983 (unreported).”

In ***Roria v R*** (1967) EA 583 (CA) it was held that “*while it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it not safe to do so.*” Judicial policy has since developed to seek corroboration in cases of identification by a single identifying witness. The court is, therefore, obliged to look for corroboration of identification evidence of a single witness where circumstances favouring positive identification do not exist. The attack in this case took place at 9.30pm in the night and the source of lighting was a torch bright, though the complainant said it was. See also ***Maitanyi v. Republic*** [1986] KLR 198.

Evidence of PW1

[26] The appellant was identified by the complainant as the attacker who had asked for the keys to the kiosk and who had picked some items from the shop and poured petrol on her and threatened to burn her if she resisted the attack as follows:

“I had not put off lights and I just heard being hit on the forehead with a piece of wood which was besides the house and another strangled me on the neck and I heard one voice tell me to switch off the lights and I switched off the lamp. One of them sat on me on the bed and another was going round with my torch to reflect and I could tell they were two and the one who sat on me asked why I had talked for long on phone as if I had money and I told them I had no money. Then they hit me my phone fell down and separated in parts. I told the person I had no money and that I only had 3,000/- immediately they hit me they poured petrol on me and I could tell by the smell and I tried to scream and it was raining and one of them poured on me and I decided to keep quiet and one sat on me while other pouring petrol on me one asked me of my phone Pin and wanted to know money in my Mpesa and Mshwari and I told them the PINs and that I had Kshs.3,200 in Mpesa and was not sure of exact money and that in Mshwari I had Kshs.1000 one of

them asked if I had any other money in the house and one going round searching clothes and searching and searching in bag, demanded for the key to the kiosk and I told them where key was and one went to open while the other one was still sat on me and whenever I tried to look he could hit me on the head with his fist. The other who went to shop came and showed me items he took from the shop among them scones and the other we confirmed later and saw the missing items among them tea leaves, 2 bar soaps, cost Kshs.700, unga ngano half bundle of 1kg each (6 pieces) and when the other returned the one who had sat on me started to rape me as the one standing with a knife was looking at us and I could identify him positively as he was tall and not very dark with a green with white sports sweaters and was the one going round in the house and showed me items he took from the house and is the one who had a torch as the lights from the torch were sufficient. I could not identify well the person who raped me as he kept beating me if I tried to look at him and he kept raping me and he was heavy. They took my phone away after raping me they asked if I had any other money and I told them no and the other person did not rape me. **The accused in court is the one who was having torch and cut me on middle finger with a knife and I could see his face well**

Corroboration of the identification evidence of PW1

[27] PW1 also said that the appellant was the one who cut her finger although he did not rape her himself he kept watch while his companion raped the complainant. Although the circumstances of identification were not suitable for positive identification in the night when the attack happened and no identification parade was held for the complainant to identify her assailant, the investigations leading to the arrest of the appellant clearly showed that he was one of the two attackers. In accordance with the authorities this court has warned itself of the dangers of convicting on the identification evidence of a single witness and sought corroboration by independent evidence, and found it in the circumstantial evidence adduced by the witnesses for the prosecution PW3, PW4, and PW6 all who identified the appellant in related events.

[28] The conduct of the appellant when the area Assistant Chief Athinai Sub-location (PW3) went to establish the owner of the house opposite to PW4's who had in the month of April 2016 given the appellant whom he knew as Baba Sonko a phone to use temporarily until he redeemed the Samsung phone he had pawned for Ksh.500/- is telling of his criminal involvement in the matter. The area chief (PW3) identified the appellant as the person who drove off with him when he went on instruction by the Criminal Investigation Officers to follow up on the matter, and had threatened to harm had the chief not jumped off the motor bike that the appellant was riding having pretended to go and show the chief the owner of the house.

[29] The involvement of the appellant in the matter is further supported by the evidence of his neighbour PW4 to whom the appellant had pawned for the sum of Ksh.500/- a Samsung phone belonging to PW6 who identified the appellant as the person for whom he paid the said sum of 500/- to recover the phone. PW4 testified that he had given the appellant a small phone **Wiko** for his use during the period of pawn for the Samsung Galaxy.

[30] PW6, the owner of the Samsung Galaxy phone who had lost it having left it at the shop in Mogotio testified how he on 24th April 2016 his phone recovered from PW4 to whom the appellant had pawned it for a loan of Ksh.500/- which the PW7 paid to recover his phone, which the appellant told him he had been given by a girlfriend.

[31] PW8 the Investigation Officer testified as to how the appellant had used the **Wiko** phone as follows:

"I also investigated to know if any other handset had been used on the cell phone that received money from complainant i.e cell phone No.0792637319 and I got one IMEI No.3595074115790 which was handset belonging to Omondi Kinda whom I traced and told me that on unknown date but within that period he had given this phone to the accused after he borrowed Kshs.500 from him and was given a small phone by Omondi Kinda and accused gave him a superior phone as security and when he refunds the money Omondi Kinda will return the phone to accused. He was given the cheaper phone so accused to use in making calls and as such that line 0792637319 was ever used in the cheaper phone give to accused and as per statement that it was used by accused. When we went to look for Omondi Kinda and got this cheaper phone, the area Chief identified the accused and pleaded to take him to hospital so as we manage to arrest him but he instead went on an opposite ditch with Chief on motorbike and tried him away at sisal area."

[32] The mobile phone line 0792637319 to which the complainant's mobile money was withdrawn was used in a **Wiko** phone belonging to Omondi Kinda PW4 which he had given to the appellant under a pawn arrangement. The phone was recovered from PW4 who detailed his transaction with the appellant in his testimony before the court, and identified his phone (MFI6) in court. The slight discrepancies in the record on the number of the **Wiko** phone which was identified may be explained by error in court recording of the number given orally before by the witnesses. For instance, PW4 is shown to have given the number as IMEI 353595074115763; IMEI 353595074115793 as per the Occurrence Book at the time of his arrest; and the Investigating officer PW8 is recorded in his testimony as having given the number of this phone as IMEI 3595074115790 in the handwritten record of the court.

[33] While the Investigation Officer could not properly produce the Safaricom data report being in the nature of electronic data subject to the rule in section 106B, the results of the use of such data may be put in evidence as part of outcome of investigations. From the evidence gathered upon such investigations, it is clear that the person who pawned a Samsung phone to PW4 for a loan of Ksh.500/- and who PW4 gave a small **Wiko** phone for use in the meantime pending repayment of the loan and the person who identified by PW7 as the person on confrontation about the Samsung phone said he had been given the phone by his girlfriend the same person who had used a **Sim** card on the said **Wiko** phone, the same sim card to which the monies stolen from the complainant's phone had been deposited. I have no doubt that the appellant was the second man in the attack theft and robbery and rape of the complainant on the night of 19th April 2016.

[34] The appellant's alibi that he was not at Mogotio on the material date, that he never lived at Mogotio and that he lived at majani mingi bordering rongai and Mogotio, only coming to Mogotio to receive his salary is discharged by the evidence of the witnesses PW3 who found him at Mogotio and identified him as the rider who rode with him under the pretext that he would show him the owner of the house at Mogotio where the PW4 said the appellant who had pawned to him his Samsung phone lived; PW4 who testified that he was his neighbour at Mogotio and identified him as the person who pawned the Samsung phone and in return received a **Wiko** Phone; and PW6 who testified that he had with his friend confronted the appellant as to the Samsung phone. All this evidence supports the complainant's identification of

the appellant at the scene albeit in difficult circumstances of night and insufficiently lighting but with the prolonged period of engagement with the appellant during the attack when he interacted with her over the keys to the shop, showing her the times he had taken from the shop and his standing guard while his co-attacker raped the complainant.

[35] Medical evidence of PW5 supported the complainant's evidence of beating on the head cut on finger and rape. Theft of shop items were proved by testimony of the complainant PW1, as was the withdrawal of mobile money from her phone. The offence of robbery with violence and rape were proved and the appellant was shown to have been one of the attackers. I find the offences charged in count I and II proved beyond reasonable doubt.

[36] The sentences of imprisonment for 30 years for robbery with violence c/s 296 (2) of the Penal Code in Count I and 15 years for gang rape contrary to section 10 of the Sexual Offences Act are within the law, I have not seen any justification for appellate interference with the trial court's discretion in sentencing. See *Wanjema v. R* (1971) EA 493.

Orders

[37] Accordingly, for the reasons set out above, the court finds no merit in the appellant's appeal and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF MAY 2020

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.