REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 7 OF 2012

SCS.....1ST APPELLANT

BK.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 777 of 2010 of the

Chief Magistrate's Court at Malindi – D.W. Nyambu, SRM)

JUDGEMENT

1. This is a rehearing of the appeal pursuant to the order of the Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR**.

2. The 1st Appellant, SCS, and the 2nd Appellant, BK, were convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code in respect of counts 1, 2 and 3. Each one of them was also convicted for the offence of gang rape contrary to Section 10 of the Sexual Offences Act, 2006.

3. The appellants were sentenced to death for the offences of robbery with violence and for the offence of gang rape the unspecified sentence was held in abeyance. The appellants had been charged together with others. They, with the leave of the court, filed separate but similar fresh grounds of appeal against both the conviction and sentence in summary being that the trial court erred in relying on the evidence of PW1, PVF on identification as it was weak and in particular that the complainant did not disclose at the first instance to her rescuers and police about her knowledge of the perpetrators, that she informed the doctor that the persons were unknown to her but would identify them if she saw them, that the identification parade was flawed hence only dock identification done, that the conditions were unfavourable for positive identification leading to mistaken identity and that voice identification was improperly applied.

4. It is also the appellants' case that the evidence was not incriminating, the prosecution did not discharge the burden of proof and the trial court disregarded their defence of alibi. Further, that the court failed to consider that the 2nd Appellant was a minor at the time of the commission of the offence hence the trial court breached sections 189, 190 and 191 of the Children Act and Article 53(1)(f) &(2) of the Constitution and finally that the sentence was excessive and unconstitutional as mitigating factors were not considered contrary to Sections 216 and 329 of the Criminal Procedure Code.

5. The appellants also made similar but separate submissions. In summary they urge that the identification was not positively done. They point out that the lighting was insufficient as per the evidence of PW1, PW2 and PW3; the assailants were disguised; the evidence of voice recognition never came out immediately after the attack; PW1 did not disclose her assailants immediately as was held in **David Masinde Simiyu & another v Republic, Criminal Appeal Nos. 33 and 34 of 2004;** PW6 was categorical that PW1 informed him that she did not know her assailants; and PW1 did not testify as to how she could recognise the 2nd Appellant's voice. In addition, the appellants submit that PW1 was frightened and was crying and there were other voices making it difficult to recognise the voices of her assailants. They relied on the decisions of **Choge v R (1985)eKLR, Karani v R (1985)** and **Muchangi Nyagah & another v R [2013] eKLR** for the point that in receiving evidence of voice identification care should be taken to ensure that the witness was familiar with the voice and no mistake was made as to what was said and who said it. They further relied on the decisions of **Matianyi v R [1986] eKLR, Abdalla Bin Wendo v Rep [1953] 20 EACA 166, Wamunga v R [1989] eKLR, Waithaka Chege v Rep (1979) KLR 271** and **Gikonyo Karume & another v Rep [1980] KLR 23**.

6. It was further urged that evidence of a single witness requires corroboration as stated in **Roria v Republic (1967) EA 583. Further, that the opinion by PW6 was not conclusive and there was no report on the DNA samples collected.**

7. The appellants also urged that if PW1 could recognise her assailants, the identification parade was of no use and in any case they ought to have re-enacted the conditions such as having the members of the parade hooded and uttering the words PW1 allegedly heard hence the voice identification was improperly applied and the remaining identification evidence was dock identification which is worthless. Furthermore, PW8 and PW7 gave contradictory evidence as to how the identification parade was conducted. According to the appellants, one witness said the identification was by touching which clearly meant that PW1 clearly saw her attackers and the other witness stated that the identification was through voice recognition.

8. It was emphasised that the bloodstained clothes and the semen stains were not subjected to forensic examination. Neither were the results of the DNA samples availed to court and that Section 36 of the Sexual Offences Act was not complied with.

9. It was urged that their alibi defences were not tested as required and that the burden of proof never shifts as was stated in **Kiarie v Republic KLR 339**. Further, that their defences was used to convict them.

10. On the ground that the 2nd Appellant was a juvenile, it is contended that he left [particulars withheld] as he had not attained the age of majority. He relied on the constitutional petition of **Katana Mangi v R [2017] eKLR** where the court found that the petitioner was a minor at the time of commission of the offence and found the sentence on being held at the President's pleasure sufficient punishment. The death sentence was thus unconstitutional and if the finding of guilt was proper he ought not to have been imprisoned.

11. Further, an order for him to be placed in a borstal institute ought to be the last resort and for the shortest time possible as was held in **Joseph Kiratu Mugo** (citation not provided). He urges that the court considers that Kenya is a signatory to the Convention on the Rights of the Children (UN 1990) and the African Charter on the Rights and Welfare of Children. According to the 2nd Appellant, the failure by the trial court to consider the issue of age compromised the trial. He referred to the decision in **Eldoret HCCRA 299 of 2009 Mohammed Wekesa Musumba v R.**

12. Finally, the appellants urge this court to consider the finding in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** on the death sentence and consider their mitigation and proceed to impose an appropriate sentence. It was further urged that in light of the unfair trial for the 2nd Appellant on account of his age at time of commission of the offence, a retrial cannot be ordered as he has been improperly put in custody for the past eight years. Reliance was placed on the decision in the case of **Bell v Director of Public Prosecution of Jamaica & another (1965) 2 ALL ER 585**.

13. The Respondent submitted that the charge sheet was not defective and the statement of offence and particulars support the offence of robbery with violence and the statement and particulars of gang rape support the said offence. It was the Respondent's submission that the trial court analysed the evidence in reaching the conclusions it made. It was further submitted that any contradictions in the evidence given by the prosecution witnesses were minor and did not vitiate the testimonies given and the trial court observed the demeanour of the witnesses and in any case the issue was curable under Section 382 of the Criminal Procedure Code. On identification it was urged that as the perpetrators spent 10 -15 minutes assailing PW1 they were identified positively. Further, that as per the parade forms the parade was properly executed.

14. This being a first appeal the duty of this court is to reconsider, re-*analyse and re-evaluate the evidence which was before the trial court and reach its own conclusions - see* ***Okeno v R [1972] E. A. 32*** **and John Mwangi Kamau v Republic [2014] eKLR.**

15. It must be remembered that **this court in its appellate jurisdiction ought not to interfere with the finding of fact by the trial court that had the advantage of observing the demeanour of the witnesses,** *unless of course any finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles - see* ***Chemagong v Republic [1984] KLR 611*** *and* ***Gunga Baya & another v Republic [2015] eKLR.***

16. The prosecution's case was that the appellants together with others not before the court gained access to the roof top of the **'kibanda'** where SS (deceased), his wife PW1, the barman Kahindi Mateso Safari who testified as PW2, and the cook Suleiman Ali Baba who testified as PW3 were dining at [particulars withheld] in Watamu. It was at that moment that PW1 saw four men enter the **'kibanda'** and thinking them to be guests alerted PW2 and PW3. The said four men made their way to the roof and they carried with them pangas, iron bars, a knife and sticks. They beat up PW1 while demanding for money before separating PW2 and the deceased leaving PW1 by herself as PW3 escaped narrowly by jumping off the balcony. Three of the said men then took turns raping PW1 and each made her utter some words to each one of them as they took turns.

17. In the meanwhile PW2 who saw PW3 jump off the roof and also heard the intruders order them to lie down and beat PW1 using the flat side of the panga was being frisked by one of the five men. He was hit with an iron bar on the shoulder and Ksh.125.00 stolen from him. PW2 also saw the intruders take PW1's suitcases that had yet to be unpacked and then was hit on the neck knocking him out. PW3 testified that he saw two of the intruders and heard them tell the diners to lie down properly. He then jumped off the roof and raised an alarm. PW5 Alfred Charo Yaa was the guard at the material time. He did not see the intruders but was hit on his head from behind knocking him off. When he came to, he took off screaming for help.

18. PW1 together with PW2 made it to the village and were assisted to get to the police station and hospital. However, S died having sustained cuts to the neck. PW1 also sustained injuries to the back of her head, neck and back.

19. PW4 Changawa Karisa the village elder responded and when he got to the camp came across the body of S lying outside. PW6 Ibrahim Abdulahim the medical practitioner examined PW1 and filled a P3 form for her. It was filled ten days post incidence. He noted the injuries to neck and head and bruises on the vaginal orifice and concluded that rape was possible.

20. The investigating officer, PW7 Corporal George Ogolla, attended S's postmortem. The postmortem report was however not produced as an exhibit. PW7 the investigating officer testified that the investigations revealed that there was an armed robbery at the camp, people were

injured and one lost his life.

21. PW1 testified that items stolen from her were two suitcases with clothes and personal effects, laptop, books, binoculars, handbag, sunglasses, purse, credit cards, Ipod, mobile phones, passport, 65 USD, Ksh. 500.00, 20 sterling pounds and a safe. The items recovered were the passport, personal effects and a broken into safe all abandoned at different locations.

21. The duty of the prosecution was to prove the ingredients of the offences charged and the identity of the assailants. On the offence of robbery with violence Section 296(2) of the Penal Code provides that:

> ***"2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

22. The Court of Appeal in **Suleiman Kamau Nyambura v Republic [2015] eKLR** reiterated the ingredients of a charge of robbery with violence under Section 296(2) as follows:

> ***"The case of Johanna Ndung'u vs Republic* - Criminal Appeal No. 116 of 2005, (unreported) *sets out the ingredients of robbery with violence pursuant to* Section 296 (2) *of the Penal code as follows:***
>
> ***a. If the offender is armed with any dangerous or offensive weapon or instrument, or;***
>
> ***b. If he is in the company with one or more other person or persons, or;***
>
> ***c. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."***

23. The Court went ahead and also held that:

> ***"Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code."***

24. The intruders wielded dangerous and offensive weapons while demanding for money and ordering the victims to lie down as testified to by PW1, PW2 and PW3. The trial court correctly found that pangas and iron bars are offensive and dangerous weapons. PW1, PW2 and PW3 also confirmed that the perpetrators were more than one and someone sustained injuries as a result of the use of the crude weapons as corroborated by PW6 through the P3 form produced. One of the victims of the robbery lost his life. PW1's and the deceased's belongings were stolen and some were never recovered such as the binoculars and a suitcase full of clothes. PW2 saw the robbers carry one of PW1's suitcases. Hence the prosecution were within the purview of ***Suleiman Kamau Nyambura*** *(supra) in terms of proving robbery with violence. Indeed all the three ingredients of the charge of robbery with violence were established in this case.*

25. Section 10 of the Sexual Offences Act provides:

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

26. Section 3(1) of the Sexual Offences Act defines rape as follows:

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

27. The armed intruders had a common intention to violently rob the complainant and the others. Common intention as defined by the Court of Appeal in **Njoroge v Republic [1983] KLR 197** stated that:

> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common object of the assembly…. Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."**

28. PW1 was left on her own with some of the intruders. PW3 jumped off the roof and PW2 and S were separated from the group and taken downstairs. It was the testimony of PW1 that she was then raped by three of the men. PW6 on examination of PW1 found injuries to her vaginal orifice and concluded that there was a possibility that rape occurred. The medical officer also found that there was grievous harm

due to the psychological effects of rape. The appellants have challenged the finding by PW6 indicating that his opinion on the rape was not conclusive.

29. The evidence of those present at the scene of crime is that the gang of armed intruders separated the men from the only woman present in that place. They assaulted the woman by hitting her on the head with their weapons and remained with her for some time. PW1 indicated that it was for a period of about 10 - 15 minutes. PW2 noted that some time later after he was taken downstairs, beaten and frisked he heard the footsteps of three people coming downstairs. These facts coupled with the medical evidence leads to the conclusion that gang rape did occur. Indeed the evidence of PW1 was clear on what was done to her. There is no reason to doubt her testimony. On top of the corroboration already alluded to, the proviso to Section 124 of the Evidence Act would come into play.

30. The identity of these intruders now comes into question. *The Court in* ***Suleiman Kamau Nyambura*** *(supra) also held that:*

> ***"In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."***

31. The identification of the perpetrators is also paramount in the offence of gang rape.

32. The trial court found that the appellants were positively identified. The evidence by the prosecution witnesses was that it was at night. PW1 informed the court that they had lit the area using a kerosene lantern lamp however downstairs was dark. PW2 confirmed that downstairs was dark and PW3 indicated that they had dinner by candle light. The witnesses indicated that the intruders wore sacks. PW2 clarified that they had covered their heads save for one of them.

33. The prevailing conditions as painted by the witnesses may not have been suitable for visual recognition and the appellants submitted as much.

34. The Court of Appeal relying on the English case of **Republic v Turnbull and others [1976] 3 All ER 549** has always warned of the need to treat evidence of identification with utmost care for a witness may be honest but mistaken. In **Marikus Oduor Otieno & another v Republic [2012] eKLR; Criminal Appeal 46 & 47 of 2009 (Kisumu)**, the Court of Appeal cited with approval its decision on this principle of law in **Joseph Ngumbao Nzano v Republic [1982] 2 KAR 212** as follows:

> ***"It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification……"***

35. The Court also went ahead and cited its case in ***Cleopas O. Wamunga v Republic, Criminal Appeal No. 20 of 1989*** *where it held that:*

> ***"…… evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification…."***

36. As pointed out the lighting was insufficient. However, three of the assailants remained with PW1 taking turns to rape her for a period of about 10-15 minutes and were therefore in close proximity. She could smell and hear them. Additionally, each of the said three made her state that their action was enjoyable. The words being **"say it is nice and you like it."** She immediately recognised the voice of the 1st Appellant. She knew him as S's cousin. Her testimony was that she was involved with the [particulars withheld] project from the beginning and she knew the 1st Appellant who used to work there. She testified that the 1st Appellant was removed by the proprietors of the camp due to misconduct and was envious of the deceased's continued running of the camp. PW1 indicated that she thought the 1st Appellant was a friend and had even purchased clothes for his baby.

37. PW1 identified the 1st Appellant through voice recognition. In **Mbelle v R [1984] KLR 626** the Court of Appeal laid down guidelines as regards the evidence of voice recognition as follows:

> **"In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognized it, and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it."**

38. In **Choge v Republic [1985] KLR 1** the Court of Appeal also held that:

> ***"There can be no doubt that evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification, since it would be identification by recognition rather than at first sight."***

39. *On recognition the Court of Appeal in* ***Anjononi & others v Republic, (1976-80) 1 KLR 1566 at page 1568*** *held that:*

> **"...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

40. Caution must be taken as was held in **Regina v Turnbull (1976) 3 All ER 549**, where the court observed that:

> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

41. The Court of Appeal in **Shadrack Mbaabu Kinyua v Republic [2013] eKLR** pointed to the need for caution to eliminate the possibility of error in voice recognition.

42. The identification was by a single witness. In **Sammy Kanyi Mwangi v Republic [2010] eKLR; Criminal Appeal No. 60 of 20006 (Nakuru)** the Court of Appeal pointed out that caution should be exercised when relying on the evidence of a single witness. The Court stated that:

> **"The law is clear that a fact may be proved by the testimony of a single witness and there is therefore no compulsion for the prosecution to summon a multiplicity of witnesses. But this Court has consistently been cautious about reliance on such evidence particularly in cases relating to identification…."**

42. The Court then went ahead and cited the decision in **Abdala bin Wendo & another v Republic (1953) 20 EACA 166** where it was stated that:

> **"…the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

43. The court also cited the case of **Roria v Republic [1967) EA 583** where it was held that:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDENER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:**
>
> **There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten if there are many as ten – it is in a question of identity."**

44. **PW1 knew the 1st Appellant, was familiar with his voice and recognised it. Further, the 1st Appellant compelled her to make certain utterances as he raped her, making the conditions obtaining to eliminate an error as to who said what.**

45. An identification parade was carried out on 21st September, 2010. PW1 identified the 1st Appellant by touching. The 1st Appellant has therefore urged that the evidence of identification by voice recognition was misapplied. He submitted that if she recognised him by voice an identification parade was superfluous and served no purposes at all as the complainant's identification was not visual. In addition, he points out that if it was visual, the conditions obtaining were not free from the possibility of error.

46. As already pointed out PW1 was familiar with the 1st Appellant. She knew him. It is in no doubt that she positively identified him by voice and the parade was of importance due to other witnesses who were required to pick out suspects of the armed robbery. The witness knew the 1st Appellant prior to the incident and picked him out in the parade as the person whose voice she had heard that night.

47. However, I am not convinced that PW3 positively identified the 1st Appellant for reasons that he saw two masked men and ran off. He did not state how he identified the 1st Appellant. Hence the evidence of identification in respect of the 1st Appellant was offered by a single witness namely PW1.

48. Although the trial magistrate in her judgement did not expressly indicate that she had cautioned herself about the dangers of basing her conviction on the evidence of a single identifying witness, I find that the evidence of PW1 was cogent enough to warrant reliance on the same. The lack of cautioning itself did not, in this case, vitiate the finding of the trial court in terms of the positive identification of the 1st Appellant.

49. During the identification parade where the 2nd Appellant was involved, PW1 requested PW8 to have the parade members to utter some words. The 2nd Appellant has urged that the said words were not recorded. I presume he meant that the words were not captured in the identification parade form. It was after uttering the words that PW1 touched the 2nd Appellant pointing him out as a suspect. As pointed out the assailants were at close proximity while they took turns to rape PW1 and each made her say some particular words. Furthermore PW1 had indicated that the 2nd Appellant was also a friend or at least she thought he was one. She also stated that he worked at [particulars withheld] at one time. This gave an impression of some familiarity. These facts convince me that even though the words were not recorded PW1 was able to positively identify the 2nd Appellant.

50. The appellants submit that their defence of alibi was not considered. The trial court held as follows:

"Both DW1 and DW2 claimed that they were at home when the offence was committed. They did not call any witnesses to support the defence of alibi. Their defences are false and I dismiss them"

51. The Court of Appeal in ***Victor Mwendwa Mulinge v R [2014] eKLR*** rendered itself thus on how the defence of alibi is addressed:

"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 …

In KARANJA V R, (supra) this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

52. The statement by the trial court that it was the onus of the appellants to bring witnesses in proof of their defence was an error in law which the Respondent concedes to. However, the prosecution witness positively identified the appellants and the appellants were picked out at the identification parades hence their defence did not cause the prosecution's watertight case to leak. It is also noted that at no time during the hearing of the prosecution case did the appellants raise the issue of the defence of alibi. The prosecution was not therefore given an opportunity by way of cross-examination to rebut the defence of alibi. The trial magistrate was therefore correct in rejecting the appellants' defence.

53. The 2nd Appellant has brought out the issue of age so as to urge that as the commission of the offence was before he attained the age of majority the trial was contrary to the provisions of law under the Children Act specifically sections 189, 190 and 191 and Article 53(1)(f) &(2) of the Constitution. The 2nd Appellant, as with the persons he was jointly charged with, was represented by legal counsel during the trial and never raised this issue. Besides this, in his defence he testified that on 18th September, 2010, which was a day after the commission of the offence, he presented his identification card to the persons who had come looking for him. He had therefore attained his age of majority and this point becomes mute.

54. In the end I find that the appeal on conviction lacks merit and dismiss the same.

55. In line with the decision of *the Supreme Court in* ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** *I have a duty to review the sentence imposed on the appellants in order to determine if the death sentence was appropriate in the circumstances.*

56. This court ought to consider both the mitigating and aggravating factors. The mitigating factors are as follows: the age of the appellants, time spent in custody including remand time, lack of previous criminal records, remorsefulness and whether or not there is reformation. The 1st Appellant during trial stated that he never committed the offences, is the first born taking care of the family, he and his wife are HIV+ and he prayed for leniency and he has a child who is bound to suffer if the sentence is harsh. The 2nd Appellant informed the court that he is a good citizen, he was innocent and was framed as [particulars withheld] was being mismanaged and that he was a victim of circumstances.

57. The aggravating facts are the total value of the items stolen, the type of injuries sustained and the gang rape of PW1. It is also noted that a person lost his life during the robbery.

58. This court ought to also make a pronouncement on the sentence on the conviction of gang rape if it finds that the death sentence is not recommended for the conviction in respect of the charges of robbery with violence.

59. It is noted that a life was lost during the robbery. There is no evidence that the deceased offered any resistance. It therefore appears that the killing of the deceased was intentional. This was aggravated by the act of the gang rape of PW1. By his own admission, the 1st Appellant was HIV+ meaning that he was not averse to infecting PW1 with a life threatening disease. Although the appellants were first offenders their actions cannot be looked at with an eye of mercy. In my view, they should be locked away from society forever. I therefore set aside the sentence of death in respect of the charges of robbery with violence and substitute therewith a sentence of life imprisonment for each of the three counts.

60. As for the offence of gang rape, I find that the appropriate sentence is life imprisonment. However, each appellant can only live once and the appropriate order is therefore to put in abeyance the life sentences for counts 2 and 3 and that of gang rape so that the appellants will serve life imprisonment for count 1. Save for the reduction of the sentence from death to life imprisonment, the appellants' appeals fail and they are dismissed.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT