



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 40 OF 2018

TYSON MUDOLA.....1ST APPELLANT

CLINTON NGONDA.....2ND APPELLANT

PATRICK SAHANI.....3RD APPELLANT

ALEX KUYA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against conviction and sentence in a judgment of 21st March 2018
in Hamisi Senior Resident Magistrate's Court Criminal case No. 942 of 2016))*

JUDGMENT

1. This appeal stems from the judgment of Hon. Nabibya aforementioned. It was filed by the 1st appellants on 3rd April 2018 and consolidated with other appeals filed by the 2nd, 3rd and 4th appellants and arising from the same trial seeking that the said decision be set aside and their convictions quashed on the following grounds *inter alia*:

- a) THAT the learned trial magistrate erred both in law and in fact in relying on the evidence of a single identifying witness to convict the appellants herein when the said evidence did not meet and satisfy the laid down legal threshold standards of pointing any guilt to the appellants;*
- b) THAT the learned trial magistrate failed and/or erred in law and in fact by not directing its mind to the effect of the prosecution's failure to avail the government chemist's report in respect of the DNA composition of the sperms that were recovered by the investigations officer in the condom allegedly used during the rape incident; hence arriving on a wrong decision thus occasioning a miscarriage of justice;*
- c) THAT the learned trial magistrate erred in law and in fact in failing to note that the complainant in the case knew the Appellants being neighbours in the same rented premises but the complainant did not give or disclose his name to the police at the first time a robbery with violence complaint was filed with the police at the by the said complainant hence the court applied wrong principles of the law in convicting the appellants;*
- d) THAT the learned trial magistrate erred in law and in fact in considering issues that were not brought out in evidence instead of concentrated on extraneous issues and conjectures therefore arriving on a wrong decision of convicting the appellants;*
- e) THAT the learned trial magistrate erred in both law and in fact in relying on evidence of recognition yet the evidence adduced by the prosecution was of identification, as the offence was allegedly committed at night under very difficult circumstances. Therefore, the court deviated from the evidence adduced before it and considered irrelevant issues not before the court;*
- f) THAT the learned trial magistrate erred in law and in fact in failing to note that the trial was in violation of the constitutional rights of the appellants and further that the evidence adduced before the court was circumstantial not fulfilling the requirements set out in criminal liability; and*

g) THAT the learned magistrate erred in law and in fact in convicting on the prosecution evidence which fell far short of the probative value to convict criminal law.

2. The appellants had been charged with the offence of robbery with violence, contrary to section 295, as read with section 296(2), of the Penal Code, Cap 63, Laws of Kenya. The particulars were that the appellants on the night of the 5th and 6th of August 2016, at Chavakali Location, Solongo Sub-Location, within Vihiga County, being armed with offensive weapons, namely *pangas* robbed SN of her laptop make HP, black bag, a torch, cash Kshs. 1,500.00 all valued at Kshs. 38,050.00, the property of SN and at a time of such robbery, threatened to use actual violence to the said SN.

3. The appellants each faced additional counts of gang rape contrary to section 10 of the Sexual Offences Act, No. 3 of 2006, with particulars being that between the 5th and 6th day of August 2016 at Chavakali Location, Solongo Sub-Location, Vihiga County, in association with one another, intentionally and unlawfully caused their penises to penetrate the vagina of SN without her consent. An alternative charge of indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No.3 of 2006 were each preferred against each of the appellants as well.

4. Upon conclusion of the trial in the lower court, the appellants were convicted on all counts and sentenced to death under count 1, and 20 years imprisonment for counts 2, 3, 4 and 5 with the sentences in the latter counts being left in abeyance.

5. I am sitting as the first appellate court and as such I am guided by the principles set out in the case *David Njuguna Wairimu vs. Republic* [2010] eKLR where the Court of Appeal stated -

'The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellants court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.'

6. The Court of Appeal, in the case of *Joseph Njuguna Mwaura & 2 others vs. Republic* [2013] eKLR also stated that -

*'...It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See *Okeno vs. R* [1972] EA. 32, *Mohamed Rama Alfani & 2 Others vs Republic* Criminal Appeal No. 223 of 2002. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court...'*

7. The issues that emerge for determination from the petition of appeal are -

a) whether the charge was properly framed;

b) whether the prosecution discharged the burden of proof to the required standard of beyond reasonable doubt by proving the essential ingredients of the offence of committing robbery with violence contrary to Section 296(2) of the Penal Code;

c) whether the prosecution discharged the burden of proof to the required standard of beyond reasonable doubt by proving the essential ingredients of gang rape contrary to Section 10 of the Sexual Offences Act; and

d) whether the Appellants was positively and properly identified.

8. The appellants were charged with the offence of robbery with violence contrary to section 295, as read with Section 296(2), of the Penal Code together with other counts aforementioned. Section 296 of the Penal Code provides for both the offences of robbery and aggravated robbery and their respective penalties under sub-sections (1) and (2) as follows:

'(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

'(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other 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.'

9. Section 295 of the Penal Code defines robbery in the following terms:

'Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.'

10. The said section sets out the elements of the offence of robbery as follows -

'(i) The act of stealing, and

(ii) Use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing.’

11. The Court of Appeal, in *Joseph Njuguna Mwaura & 2 others vs. Republic* [2013] eKLR, held as follows -

‘This Court was confronted with the issue whether a charge sheet citing only section 296(2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:

‘...the ingredients that the appellants and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.’

“In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellants was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal.” (emphasis added)”

“Similarly in *Joseph Onyango Owuor & Cliff Ochieng Oduor vs. R* [2010] the Court was again confronted with a similar situation. In that appeal, the appellants had submitted, as have the appellants in the present appeal, that section 296 (2) of the Penal Code does not create an offence but merely makes provision for the punishment for robbery with violence. The Court had this to say on the issue:

“Mr. Musomba submitted that unless the aforementioned sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 292(2) of the Penal Code, have a common marginal note, namely “punishment of robbery”. In this country marginal notes are as a general rule, read together with the section. By the *ejusden (sic) generis* rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the Penal Code.”

The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:

‘Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.’

We agree that this is the correct proposition of the law. Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor vs. R (supra)* the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

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

12. The Court of Appeal in *Paul Katana Njuguna vs. Republic* [2016] eKLR held that:

“Although the side note describes section 295 as definition of robbery, it is evident that the section goes beyond mere definition and creates a felony termed robbery by setting out clearly the elements of that felony.

We are alive to the fact that the First Schedule to the Criminal Procedure Code lists the offence of robbery under section 296(1) of the Penal Code; the offence of robbery with violence, under Section 296(2) of the Penal Code...

It is illustrative, however, that at the commencement of that First Schedule, the following caution is given: -

'The entries in the second and fourth columns of this Schedule headed respectively 'offence' and 'punishment under the Penal Code', are not intended as definitions of the offences and punishments described in the several corresponding sections of the Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

This Court has on several occasions had to deal with difficulties presented in considering the true purport and intendment of Sections 295, 296(1) and 296(2) of the Penal Code. In Joseph Onyango Owuor & Another vs. Republic [Criminal Appeal No. 353 of 2008] (UR), the appellants complained that Section 296(2) under which he was charged did not create an offence. He argued that Section 296(2) cannot, therefore, stand on its own. In his view, a charge under Section 296(2) could only be sustained if read with Section 295 of the Penal Code. We rejected that argument in the following words:

"Likewise, the submission that the violence envisaged under 296(2) is different from that envisaged under Section 295 of the Penal Code is untenable. Section 295, does not deal with the decree of violence being merely a definition section. It is analogous to Section 268 of the Penal Code which deals with definition of "stealing" and subsequent sections which deal with different categories of offence of stealing. Section 296(1) and Section 296(2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such".

The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellants was charged with robbery with violence contrary to Section 295 as read with Section 296(2). Is that fatal? We think not. In Joseph Onyango Owuor & Another -v- R (supra) this Court found that when dealing with the offence under Section 296(2) of the Penal Code the statement of the offence has to be read as referring to the aggravated circumstances of the offence of robbery provided for under Section 296(1) of the same code. The Court further concluded that "the submission that the violence envisaged under Section 296(2) is different from that envisaged under Section 295 of the Penal Code is untenable. Section 295, does not deal with the degree of violence being merely a definition section.

We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged. In Laban Koti vs. R. [1962] 1 EA 439 (SCK) ... The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".

"In that case, the court held that the appellants were left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way.

...in Amos vs. DPP [1988] RTR 198 DC, the Court held that uncertainty in the mind of the accused person is the "vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain.

Back home, in Mwaniki vs. Republic [2001], EA 158 (CAK), this Court held as follows:

"Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted"

On appeal, this Court found that it was not possible to determine which offence the appellants had committed as several offences had been charged in the alternative, the Court stated:

"These clearly were separate offences charged alternatively in one count and in our view, we would respectively follow the decision of the Court of Appeal for Eastern Africa in Cherere's case which correctly set out the law when the court held that to charge two or more offences in the alternative in one count is not merely a formal but substantial defect and that in such a situation, an accused person must be taken to have been embarrassed or prejudiced as he does not know what he is charged with, and if convicted, of what he has been convicted".

The issue of duplicity of a charge also came up in Dickson Muchiro Mahero vs. Republic [2002] eKLR...The Court found that, indeed, causing death is a distinct offence from dangerous or careless driving or obstruction and that particulars of any charge under Section 46 are offences in themselves. With regard to the appellants' argument that the charge as framed alleged two offences in one count namely, first, causing death by driving a motor vehicle at a speed and second, by driving a motor vehicle in a manner which was dangerous, the Court held that the particulars were merely intended to give the appellants reasonable information as to the nature of the offence he faced. After considering the record before it, the Court was satisfied that the appellants understood the charge he faced and was in no way prejudiced.

The Court in that case cited with approval the English case of Ministry of Agriculture & Fisheries and Food vs. Nunn [1978] Ltd [1990], Cr. LR 268 DC, where the court emphasized that the question of duplicity is one of fact and degree; and that the purpose of the duplex rule is to enable the accused to know the case he has to meet.

In the matter before us, we are unable to detect any prejudice which the appellants suffered. The record shows that the appellants suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is

aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.’

13. Section 134 of the Criminal Procedure Code provides that a charge sheet should be drafted in such a way that; -

(i) it discloses an offence known in law;

(ii) offence is disclosed and stated in a clear and unambiguous manner such that the accused person pleads to a specific charge which is easily understood so as to also enable the accused person prepare the defence; and

(iii) The charge should contain all the essential ingredients of the offence.

14. From the record of the trial court proceedings, the charges were read to each of the accused persons to which all of them responded in the negative “not true” for all the counts and a plea of “not guilty” was entered. At no point during plea-taking did they express confusion as to the type of charges that had been read out to them. The issue of duplicity was not raised at any stage of the trial or in the instant appeal by the appellants. The appellants’ advocates cross-examined witnesses for the prosecution and in their defence, never raised the issue of duplicity of charges. I am of the opinion that the charges, though duplex, were not fatally defective as the appellants understood the charges facing them and there was no sense of uncertainty during the trial or in the instant appeal. The appellants were never prejudiced or embarrassed in any way, nor was there a miscarriage of justice.

15. The Court finds that the defect in the charges was curable under Section 382 of the Criminal Procedure Code and were properly before the trial court.

16. This Court, in the case of *Joseph Kaberia Kahinga & 11 others vs. Attorney General* [2016] eKLR stated that:

‘The offence under Section 296(2) of the Penal Code in addition to the ingredients specified under Section 295 of the Penal Code has the following ingredients:

(i) The offender is armed with a dangerous or offensive weapon or instrument, or

(ii) The offender is accompanied with one or more person(s)

(iii) The offender wounds, beats, strikes, or inflicts any other personal violence to any person immediately before or after the time of robbery.

The term robbery has been defined in various cases. In the case of *Shadrack Karanja vs. Republic Criminal Appeal 119 of 2005; [2006] eKLR*, the Court of Appeal stated as follows:

“The same issue was raised in *Moneni Ngumbao Mangi vs. Republic Criminal Appeal No.141/2005 (UR)* and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code as analyzed in *Johana Ndungu vs. Republic, Criminal App. No.116/1995 (UR)*. After noting that the charge sheet in that case stated, as it does in this case, that the Appellants “robbed” the Complainant, the Court continued: -

‘The word “robbed” is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property. The predecessor of this Court so held in *Opoya vs. Uganda [1967] E.A. 752 ...*’

As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence ...’

17. This Court in the case of *Mohamed Ali vs. Republic* [2013] eKLR held that:

“... The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch vs. Republic [1985] KLR* where it was held:

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

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

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ...”

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.'

18. This Court in the *Joseph Kaberia Kahinga Case* (supra) goes on to cite the Court of Appeal in the case of *Johanna Ndungu vs. Republic* Criminal Appeal No. 116 of 1995 where the Court of Appeal held in part:

'...Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed time (sic) of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him. In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction there under must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.'

19. This Court, in the case of *Lawrence Chamwanda & another vs. Republic* [2016] eKLR held that

"The Court of Appeal applied to same principle in the case of Daniel Muthoni M'arimi v Republic [2013] eKLR and stated that proof of any of the three elements of the offence of robbery with violence would be enough to sustain a conviction under section 296(2) of the Penal Code.'

The court goes further to cite the Court of Appeal case of *Samson Nyandika Orwerwe vs. Republic* [2014] eKLR while applying the principle in the *Oluoch* case (supra) and held: -

'Applying these principles to the appeal before us, we are satisfied that the three elements were proved. The uncontroverted evidence of PW1 was that he was approached by two men who used personal violence on him. One kicked him and the other helped push him out of the car to where they tied him to a tree. He was found tied to this tree by PW2. PW1 had injuries on his hands and mouth as attested to by PW5 who confirmed that fact, and that the degree of injury was harm. It is therefore clear that the ingredients of the offence of robbery with violence were present.'

20. This Court in the *Joseph Kaberia Kahinga Case*(supra) goes on to state that:

'In Johanna Ndungu case (supra) the court found the offence proved based on the facts which they set out thus:

"In this appeal the facts that are proved are as follows:

i) The appellants at the time of robbery as defined in S.295 of the Penal Code was a member of a gang of three, one of whom was armed with a knife and one other was armed with a stick. That finding alone was enough to convict him under sub-section (2) of section 296 of the Penal Code.

ii) The appellants were in company with two other persons at the time of the said robbery. That finding again on its own was enough for a conviction under S.296 (2).

iii) The complainant (victim) at the time of robbery was actually beaten and wounded by the gang of three of which the appellants were a member. That finding also on its own was enough to convict appellants under sub-section (2)."

Further, what constitutes a dangerous weapon has not been defined, and that is an issue which has drawn conflicting interpretations from various courts. While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, under the definition of dangerous or offensive weapon, it includes at one extreme a stone or stick and the other extreme a firearm. The point we are making is that the law is not clear what circumstances would constitute robbery under Section 296(1) of the Penal Code, and what constitutes robbery under Section 296(2) of the Penal Code.

We find and hold that all the persons that have been charged with and convicted of the offences of robbery and attempted robbery under Sections 296(1) and (2) and 297(1) and (2) of the Penal Code did not have the full benefit of the right to fair trial as provided under Article 50(2) of the Constitution Section 77(1) of the repealed Constitution.

We have examined Sections 295, 296(1)and (2) and 297(1) and (2) of the Penal Code and have come to the conclusion that the said sections of the Penal Code are ambiguous and are conflicted to such an extent that it violates an accused person's right to fair trial as provided under Article 50 (2)(b) of the Constitution and Article 27 of the Constitution that requires accused persons, who are a special category of persons facing criminal trial, to be given equal treatment and to be

21. This Court in the *Joseph Kaberia Kahinga Case*(supra) made the following declarations and orders in a judgement delivered on 15th September 2016:

'1. We hereby declare that Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences.

2. In light of (1) above, we recommend that the Attorney General, the Kenya Law Reform and other relevant agencies to prepare a detailed professional review in the context of the judgment and order made with a view to enabling Parliament to appropriately amend Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code with a view to removing the ambiguity and inconsistency inherent in the said sections as regards the definition of the offence of robbery and differentiate and graduate the degrees of aggravation and the attendant penalties. In considering the amendments, it should be recommended to Parliament to take into consideration International good practices on sentencing, so as to accord similar facts to similar charges of equal gravity.

3. In view of the fact that there are pending trials before the courts at various stages of the hearing process where accused persons have been charged under the impugned sections of the Penal Code, and in order not to prejudice those trials, the effects of the declaration in(1) above, is suspended for eighteen (18) months from the date of the delivery of this judgment to enable the Attorney General, the Kenya Law Reform and Parliament to act and appropriately amend the impugned sections of the Penal Code with a view to removing the identified ambiguities and inconsistencies and setting out the degrees of aggravation, and differentiate and graduate the various aspects of the offence of robbery.

4. As regards the Petitioners, and those other convicts in the same situation as them, we direct the Attorney General, in consultation with other relevant authorities, to consider the shortcomings identified in this judgement in relation to those charged and convicted under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code, with a view to remedying any prejudice that may have suffered and prescribe appropriate solution. The Attorney General is granted eighteen (18) months to give a report to this court.

5. If the above orders are not complied with within the stipulated period, the Petitioners shall be at liberty to apply.

6. The Petitioners' prayer for declaration (ii) in their Petition to have their respective cases remitted to the trial courts for the reception and consideration of their mitigating circumstances is hereby dismissed.

7. Since this is a constitutional matter, and due to the public interest involved, we are of the view that the appropriate order to make in regard to costs is that there shall be no orders as to costs.'

22. The moratorium period aforementioned was between the 15th day of September 2016 and 15th day of February 2018 or thereabout. The instant case was ongoing at the lower court at the time and thus consideration of the same will be based on Section 296(2) of the Penal Code as it was then, if at all there were any changes to the impugned section. In light of the foregoing, i shall examine the evidence on record and draw my own conclusions as to whether the prosecution discharged the burden of proof to the required standard of beyond reasonable doubt by proving the essential ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

23. Mr. Emmanuel Oranga, was a medical officer who testified in the matter on behalf of his colleague who had attended to the complainant, he testified as PW1. he stated that the complainant came to Sabatia Hospital claiming to have had been assaulted, and she was issued with the Medical P3 report (P exh 1) and Treatment chits (P exh 2) from St Elizabeth Hospital, Mukumu indicating tenderness on her head, neck, chest and right knee. PW1 stated that she was examined twelve hours after the said injuries and that the probable weapon causing injury was a blunt object. On cross-examination, PW1 stated he did not have any documentation related to the appellants. The complainant, testifying as PW2, stated that she was confronted by four people at her gate and one of them had a panga. The tall person threatened her with death using the panga if she continued screaming for help. She identified the tall person as the 1st appellant who was holding her right hand, the 4th appellants held her from behind on the right side, the 2nd appellant was holding her by her trousers on the left side, the 3rd appellant was holding her on the left hand as she was being led away. She stated that the 1st appellant took her bag containing a HP laptop and a pouch containing Kshs. 2,000,00 all of which were never recovered. Humphrey Khisa, testifying as PW3, stated that he was informed by the Principal of Keveye Girls Secondary School that PW2 had been attacked after he (PW3) dropped her off the road. PW2 also informed PW3 that she was attacked by 4 people who PW2 said had been sent to kill her. Judith Mbaya Ngome testified as PW4 and stated that she received a call from PW2 who told her that she had been attacked. PW4 sent the school driver to get PW2 who was brought to the school, she was looking disoriented and was limping. Corporal Paul Mutua testified as PW6, he was the investigating officer in the case. he stated that PW2 reported a case of robbery and gang rape at Chavakali Police Station. PW2 told the PW6 that she lost a laptop and other contents and handed over the purchase receipt of the laptop which indicated that it cost Kshs. 35,000.00.

24. The question that I seek to answer here is whether the prosecution discharged is burden of proof with regard to the sexual offence of gang rape. Section 10 of the Sexual Offences Act provides 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.'

25. Under Section 3(1) of the said Act, a person is deemed to have committed the offence of 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.

26. The Sexual Offences Act defines "penetration" as

'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'

27. This position was fortified in the case of *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...'

28. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated. The Court of Appeal, in the case of *Sahali Omar vs. Republic* [2017] eKLR, noted that:

'...penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act.'

29. in *Jeremiah Mwangi Ngatia vs. Republic* [2015] eKLR stated that:

'The actus reus of rape is having unlawful sexual intercourse with a woman or a man who at the time of the intercourse does not consent to it. While the mens rea is an intention to have sexual intercourse with another person knowing that he or she does not consent to the act. Consent is important to sexual matters because it can transform coitus from being among the most heinous of criminal offences into sex that is of no concern at all to criminal law. Consent is a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest and verbal agreement. Consent cannot be coerced; never implied and cannot be assumed, even in the context of a relationship. The law clearly states certain circumstances in which consent cannot be said to have been obtained and these include when a person is physically or mentally disabled. The complainant is said to be somehow mentally retarded. He cannot be said to have consented to the act nor can it be said he appreciated the nature of the act. In the case of Republic vs. Oyier, [8] the Court of Appeal held that: -

"the lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not."

30. This court, in the case of *Dominic Ochieng Odoyo & another vs. Republic* [2015] eKLR stated that:

'The key ingredients of the offence of gang rape include the following:

a. Proof of rape or defilement;

b. Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.'

31. From PW1's testimony, the complainant was examined on her genitals and was found to have a swollen vulva, bruises on both labias and bruises on the vaginal wall. The same was indicated in the medical P3 form and treatment chits. Various tests were conducted on her which disclosed that she was HIV negative, UDR1 negative and pus cells seen on urinalysis test. The examining doctor remarked that there was evidence of penetration and evidence that she struggled with her assailants because of the bruises on the vaginal walls, hence the conclusion that the complainant had been raped. The complainant stated that she was raped by all the appellants in turns. PW3 and PW4 testified that they were informed by her that she was gang raped. PW6 testified that he discovered two used condoms at the crime scene. On cross-examination, he stated that the condoms together with the complainant's samples were taken to the Government Chemist for tests but the results were not out by the time he was testifying.

32. Were the appellants positively and properly identified? The complainant testified that she was led away from the gate to her house by the appellants, towards Chavakali and she was able to positively identify them once they got to a place with street lights. She stated that the 1st appellant was a person known to her as he supplied bulls to the school where she worked as a teacher. In his defence, the 1st appellant conceded that the complainant knew him as he supplied meat to the school, corroborating complainant's testimony. The 1st appellant further

stated that they were also neighbours and that they know each other. The complainant stated that she engaged the 1st appellant in a conversation as they walked on the road. She further gave a description of the 1st appellant to the police. She also recognized the 4th appellant at the police station. She stated she had seen the 2nd and 3rd appellants walk past her gate the day before the attack, and said that she even asked them if she could help them but they did not respond. She said that the 3rd appellant lived behind the estate where she used to stay, and that the 4th appellant was always in the company of the 1st appellant. On cross-examination, she stated that the 3rd appellant was known to her as he used to stay at a neighbour's place and reiterated that the 1st appellant was someone well known to her. The complainant later stated that she identified the 2nd and 3rd appellants in an identification parade (ID parade). On cross-examination, she stated that she identified the 3rd appellant who had dreadlocks then and picked him out of a parade of about 10 people. At the identification parade, three people had dreadlocks. She stated that the incident was fresh in her mind, asserting that she could see the faces of her attackers as they raped her. She gave a description of the 2nd appellant to the police and identified him at the identification parade. PW4 also testified that the complainant told her that she could identify the attackers.

33. Chief Inspector Bernard Njeru, testified as PW5, stated that he conducted the identification parade and that the 2nd and 3rd appellants participated in that parade, and were positively identified by the complainant. PW5 further stated that the complainant and the members of the identification parade were in different rooms and did not see each other before the identification exercise. On cross-examination, PW5 stated that he had not been told about the physical features of the suspects by the complainant before the parade and that the members of the parade were as much as possible of the same appearance as the 3rd appellant. All the members of the parade wore similar clothes. PW5 further stated that he had no prior information from the complainant as to the physical features of the 2nd appellant. PW6 stated that the complainant told him she was able to identify some suspects and that one of the suspects lived in the estate next the estate where she resided. PW6 further stated that the complainant had seen the 1st and 4th appellants walking into the police station and immediately identified them as the robbers and rapists whereupon they were arrested. On cross-examination, he stated that the complainant gave a physical description of the 2nd and 3rd appellants.

34. In the case of *Maitanyi vs. Republic* [1986] eKLR it was held that:

‘Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with 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.’

“... That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves.”

“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve.’

35. the Court of Appeal in *Karanja & another vs. Republic* (2004) 2 KLR 140, 147 said -

‘The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows: -

“We now turn to the more troublesome part of this appeal, namely the appellants’ conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellants among the robbers who attacked and robbed them..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellants. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of R vs Turnbull [1976]3 All ER 549 at page 552 where he said: -

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

36. In the *Lawrence Chamwanda* case(supra) this court observed that:

‘...The complainant gave the identity of her assailants and on the basis of that information, the appellants were arrested and stolen items recovered. This was in line with the holding in the case of Simiyu & Another vs. Republic [2005] 1 KLR 192 on the need to

give a description of the attackers where the complainant alleges to have identified or recognised them. (See *Lessavay vs. Republic* [1988] KLR 783), *Francis Kariuki Njiru & 7 others v Republic* 2001 eKLR.)’

37. The learned trial magistrate ruled that the appellants had a case to answer and placed them on their defence. The 1st appellant denied any wrong doing, stating that he arrived at his home at 8.15pm on the material date, took a shower and slept. He stated that he was with his wife the whole night on the material date. The 2nd appellant stated that on the material date, he came back home, where he stayed with his sister and mother at 6.00pm and did not go out after that. The 2nd appellant denied any wrongdoing and stated that he did not know the complainant and the 3rd and 4th appellants, and that he only saw the complainant for the first time at the identification parade. The 3rd appellants stated that he came back home at 6.30pm and that he did not know the other appellants. However, he stated that he knew the complainant, even going on to state where she lived. The 3rd appellants further stated that he had no problem with the complainant. The 4th appellant stated that he went home at 7.00pm on the material date and did not leave. He denied any wrongdoing, saying that he did not know the complainant by the time he was being arrested.

38. Judith Isalano, testifying as a witness to the 1st appellant stated that the 1st appellant was her husband and that he came into their house at 8.15pm on the material date, slept and woke up the following day at 6.00am and proceeded to the slaughterhouse. On cross examination she stated that she slept with the husband and he did not wake up. She was unsure if the 1st appellant had done anything wrong. She pleaded that they had two children and thus did not want him to be jailed. Susan Kawai, testified as a witness for the 2nd appellant whom she stated was her brother and that they stay and sleep in the same house. Susan stated that the 2nd appellant never went out on the material date. Petronilla Kedogo, testified as a witness for the 4th appellant, whom she stated was her husband. She said that the 4th appellant came home at around 8.00pm and she served him with supper, and he slept, never going out again.

39. In my opinion, the evidence of the complainant had been cogent, unshaken, credible and consistent from the onset. She was adamant that she was able to identify her attackers, which evidence was supported or corroborated by the evidence of PW3, PW4 and PW6. The complainant was able to properly and positively identify the appellants, all of whom she had seen before the material date. She was able to identify them once they got to the Chavakali Junction which had street lights, and therefore gave her a good view of her attackers. None of the appellants gave any reason as to why she would have wanted to frame them, neither did they demonstrate that she had had a grudge or problem with them.

40. It was held in *Mohamed Ali vs. Republic* [2013] eKLR (supra) held that:

‘More importantly the appellants were a person who was not a stranger to the complainant. The complainant testified that he knew the appellants by appearance having seen him before in Majimboni estate. Therefore, there is evidence of recognition which was held in the case of Anjononi & Others vs. Republic [1980] KLR to be “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.” In this case the complainant was identifying a person whom he was able to recognize thus reducing further the risk of a mistaken identity. We are satisfied that notwithstanding the fact that identification was by a single witness our view is that the identification was watertight.’

41. It should be noted as aforementioned that a conviction for the offence of robbery with violence will follow if either of the ingredients of the offence have been satisfied.

42. In this case, the 1st appellant was armed with a *panga* and threatened to use it on the complainant if at all she cried for help; there were more than two people at the scene of the crime, the four appellants; the appellants caused injuries to the complainant to her genital organs, head, neck, chest and right knee as shown by the treatment chits and medical P.3 report presented at the trial court; the appellants also and robbed the complainant of her laptop and a pouch containing Kshs. 2,000.00 or stole those items from her. Each of the findings above are enough and can secure a conviction on their own for the offence of robbery with violence.

43. In my view this was a classic robbery with violence incident that fits the bill, encompassing all the ingredients necessary to warrant a conviction and I am in agreement with the learned trial magistrate that the prosecution proved their case against the appellants for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

44. The prosecution was also able to satisfy the ingredients of gang rape contrary to section 10 of the Sexual Offences Act. There was evidence of improper penetration as was stated by the complainant and corroborated by the evidence of PW1 through the treatment chits and P3 report which concluded that she was indeed raped. The evidence of the tattered clothing of the complainant, and injuries to the neck and genital organs, which the complainant mentioned as she described how she was being forcefully held by one of the appellants as she was being raped present a picture of a struggle between her and the appellants, which suggested that the sexual contact was not consensual.

45. On the issue of the DNA sample tests not being presented in the trial court, it is worth noting that presentation of such evidence is couched in discretionary rather than mandatory terms. Section 36(1) of the Sexual Offences Act provides that:

‘36.

Evidence of medical, forensic and scientific nature

(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.’

46. The above provision was deliberated on by the Court of Appeal in the case of *Robert Mutingi Mumbi vs. R*. Criminal Appeal No. 52 of 2014 (Malindi), where the Court of Appeal stated:

'Section 36(1) of the Act empowers Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the Accused person and the offence. Clearly that provision is not concluded in mandatory terms.

Decision of this Court abound which affirm the principle that Michael or DNA evidence is not the only evidence of which commission of a sexual offence may be proved.'

47. This court in the *Martin Okello Alogo* case (supra) cited the case of **Williamson Sowa Mbwanga vs. R** where the Court of Appeal had stated:

'... As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured ... It is party for this reason that Section 36(1) of the SOA is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing.'

48. I agree with the learned trial magistrate the *alibi* defences of the appellants were not credible. Even though this court did not have the privilege of impeaching the character of the witnesses as they testified, the record of the proceedings suggests that the alibi witnesses were just keen on saving their husbands and relatives from jail and thus they were willing to do anything for them so as to avoid jail time.

49. On the issue of criminal threshold to warrant or guarantee conviction, the Court of Appeal in the case of *Joan Chebichii Sawe vs. Republic* Crim. App. No. 2 of 2002 stated that:

'...The prosecution has to prove its case beyond reasonable doubt. What is reasonable doubt? Denning J in the case of Millier vs. Minister of Pensions [1947] explained what reasonable doubt is. He stated:

"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Lord Diplock in the case of Walter vs. Republic [1969] explained reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in your own affair, you may --allow to influence you one way or the other. It also can be said that it is a doubt that can be given or assign reason as opposed to speculation'

50. On the issue of circumstantial evidence, this Court, in the case of *James Muriithi Njoroge vs. Republic* [2016] eKLR stated that:

'There are very clear parameters that a prosecution should meet when relying on circumstantial evidence. Those parameters were the subject of discussion in the case, Benson Limantees Lesimir & Anor. vs. Republic Criminal Appeal NO. 102 &103 of 2002 where the Court of Appeal stated: -

"In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of R. vs Kipkering Arap Koske & Another 16 EACA 135 where it was inter alia held that:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

51. This Court, in the case of *Republic vs. Samson Lotukei Loitasia* [2017] eKLR goes further to say:

'A case annexed on circumstantial evidence...must satisfy the three test laid in the case of Abanga alias Onyango vs. Republic Cr. Appeal Number 32 of 1990(UR) that is: -

- 1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- 2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
- 3. The circumstances taken cumulatively, should form a chain so complete that there is no escape form the conclusion that within all human probability the crime was committed by the accused and none else.'*

52. It is my finding that the learned trial magistrate correctly applied her mind to the evidence adduced and rightly convicted the appellants. The evidence against them was overwhelming and warranted nothing short of the conviction handed down to them and the sentence meted against them. The upshot is that this appeal against the conviction and sentence fails in its entirety and the same is hereby dismissed and the

trial court's conviction is upheld. On the sentence meted out, I am alive to the recent decision of the Supreme Court on mandatory death sentences of the case of *Francis Karioko Muruatetu vs. Republic* (2017) eKLR taking that into account is shall review the sentence imposed and substitute the same with one of imprisonment for thirty (30) years.

DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019

W MUSYOKA

JUDGE