REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL 155 OF 2018

(Appeal against conviction and sentence in Senior Principal Magistrate's Court at Mumias CRC No. 1301 of 2016 by Hon. C. C. Kipkorir SRM on 19/10/2018)

LABAN MAENDE MKAISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein was vide Mumias PMCCR no 1301 of 2016. charged with the offence of Robbery with Violence Contrary to Section 295 as read with 296 (2) of the Penal Code .The particulars being that on the 1st day of December 2016 at Koyonzo location, Matungu sub-County within Kakamega County jointly with others not before court, while armed with a G3 rifle ,axe and a sword robbed Patrick Tom Wesonga of Ksh 750,a mobile phone make techno N2S black in colour valued Ksh 1,000/=,all valued at Ksh 7,199/= and at the time of the robbery threatened to use actual violence against the said Patrick Tom Wesonga .

2. He was also charged on Count II with the offence of Robbery with Violence Contrary to Section 295 as read with 296(2) of the Penal Code .The particulars being that on the 1st day of December 2016 at Koyonzo location, Matungu sub-County within Kakamega County jointly with others not before court ,while armed with a G3 rifle ,axe and a sword robbed Alfred Ouma Mboka of a mobile phone IMEI NO 86836205673425/86836205673434 make techno red and black in colour valued at Ksh 2400/= and at the time of the said robbery threatened to use actual force on the said Alfred Ouma Mboka.

3. He faced an alternative charge of Handling stolen goods contrary to Section 322(1) as read with sub section (2) of the Penal Code. Particulars being that on the 2nd day of December 2016 at Koyonzo location, Matungu sub-County within Kakamega County, otherwise than in the course of stealing, dishonestly received or retained a mobile phone IMEI NO 6836205673425/86836205673434 make techno red and black in colour knowing or having reason to believe it to be stolen goods.

4. The Appellant was also charged on Count III with the offence of Robbery with Violence Contrary to Section 295 as read with 296(2) of the Penal Code. The particulars being that on the 1st day of December 2016 at Koyonzo location, Matungu sub-County within Kakamega County jointly with others not before court, while armed with a G3 rifle, axe and a sword robbed Patrick Osundwa Chitechi of a mobile phone make Itel black in colour and valued at Ksh 2000/=, cash Ksh 300/= and at the time of the said robbery threatened to use actual force on the said Patrick Osundwa Chitechi.

5. He was charged on Count Iv with the offence of Gang Rape contrary to section 10 of the Sexual Offences Act No 3 of 2006.Particulars being that on the 1st day of December 2016 at Koyonzo location, Matungu sub-County within Kakamega County in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of C.W of a child aged 16 years.

6. The alternative charge being the offence of committing an indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act. Particulars being that on the 1st day of December 2016 at Koyonzo location, Matungu sub-County within kakamega County in association with others not before court intentionally and unlawfully caused his penis come in contact with the vagina of C.W of a child aged 16 years.

7. On Count V he was charged with the offence of Having suspected stolen property contrary to section 323 as read with Section 36 of the penal Code. Pariculars being that on the 2nd day of December 2016 at Koyonzo location, Matungu sub-County within Kakamega County, having been detained by Pc Edward Mwazonga as a result of the exercise of the powers conferred by Section 26 of the criminal procedure Code, had in possession item as per the attached sheet reasonable suspected to have been stolen or unlawfully obtained.

8. The trial Magistrate convicted the Appellant on Count I, II, III and sentenced him to serve 25 years imprisonment. He was sentenced to serve 15 years imprisonment for count IV. the sentences are to run concurrently.

The Appeal

9. Being dissatisfied with the conviction and sentence, the Appellant filed a petition of Appeal dated 2nd November 2018. The appeal raises the following seven grounds of appeal.

> 1. That the Learned Magistrate erred in law and in fact in finding him guilty of the Count IV when the complainant broadly and publicly denied before the court he was not the perpetrator.
>
> 2. That the Learned Magistrate erred in law and in fact where he acted in contravention of section 124 of the Evidence act by considering identification of a single witness without material evidence in support of the same.
>
> 3. That the Learned Magistrate erred in law and in fact in his findings by declaring Count IV proved basing on the DNA test carried out and obtained in a manner that violates the procedure stipulated under section 122 of the penal code and section 36 of the Sexual Offences Act.
>
> 4. That the Learned Magistrate erred in law and in fact in convicting of handling goods in absence of standing evidence of recovery of the same.
>
> 5. That the Learned Magistrate erred in law and in fact by finding him guilty of the offence basing on the identification levied by one person and of which the circumstances surrounding the incidence could not allow one to sufficiently and positively identify someone.
>
> 6. That the Learned Magistrate erred in law and in fact inlaw and facts in rejecting the evidence of Pw1 the crucial witness and a victim who confessed before the trial magistrate that she had nothing to connect him to the offence.
>
> 7. That the Learned Magistrate erred in law and in fact by rejecting and dismissing the Appellant's conclusive proved and plausible defence of alibi without proper evaluation.

Duty of the Court

10. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **OKENO VS REPUBLIC [1972] EA 32.**

In **KIILU & ANOTHER VS. REPUBLIC [2005]1 KLR 174**, the Court of Appeal stated thus:

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."**

The same was reiterated in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR** where the court of appeal stated:

> **"The duty of the first appellate court is to analyze 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 appellant 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."**

The Evidence and Submissions

The Prosecution Case

11. The prosecution called 11 witnesses.

Evidence was led that on the 1st December 2016 at about 12. 10 am while PW 2 his two children C.W and MW, PW3 and PW4 where in church praying, the Appellant in the company of two others broke into the church and ordered them to lie on the pulpit. The assailants demanded for money which they took, together with the victims' phones. They also took C.W outside and defiled her and when they came back they asked her to switch the lights on and ordered her to lie on the pulpit. PW2, PW3 AND PW4 all testified that C.W was bleeding when she came back.

12. PW2 testified that the Assailants were armed with a gun, an axe and a sword his evidence on the robbery was corroborated by PW 3 and PW4 who were also robbed of their phones and money. PW2 stated that he saw the Appellant as one of their assailants and that he had an axe and that he saw his face when he pressed his phones button and the screen light shown on his face. He also later identified him through an Identification Parade organized by the police.

13. PW9 testified that on the dated of the robbery she was with her father in church when they were accosted by three men who demanded that they give them their money. She testified that one of the three men took her out and ordered her to remove her clothes and that they defiled her in turns. She testified that she was hurt in her vagina and was bleeding throughout the ordeal and after.

14. PW1 a clinical officer confirmed that PW9 was treated at St Mary's Hospital on the night of the incident. She stated that PW9 was bleeding and had laceration on her vagina. She also had epithelial cells in her vagina and she concluded that she was defiled. PW5 SGT David Walekwa testified that on the 2/12/2016 he was called by a commander who directed them to trail three suspects. PW5 was accompanied by PW7 and PW10 and that they trailed the suspects who were aboard Motorcycle TVS KMDU 088N. The suspects stopped at a bush and when they confronted them they ran away. He testified that when they searched the bush they recovered a gun covered in clothes. They further trailed the Appellant to his house and arrested him. They then searched his house and recovered several phones in a bag that they had seen him carry to the house as they trailed him. One phone belonged to PW4. His evidence was corroborated by PW7 and PW10.

15. PW10 stated the events as they had been narrated by PW5. He took DNA samples from the Appellant and that from C.W 's vaginal swab and pant. DNA sample matched that of the Appellant.

16. PW11 confirmed that an identification parade was carried out and that PW2 identified the Appellant as one of his assailants.

The Defence Case

17. The Appellant denied his involvement in the robbery. He stated that on the night of the alleged robbery he was at home taking care of his ailing father with his brother. He stated that he was not aware of the phones recovered in his house. He also denied results of the DNA.

18. DW2 his brother testified that their father was sick and that he was at home. He however confirmed that he was not at home on the night of the robbery and could not vouch for the Appellant's whereabouts.

19. In his submissions, the Appellant challenged the manner in which the DNA evidence was collected and adduced before court. He contested the manner in which the report by the government analyst was produced and when the tests were conducted. He further submitted that the identification was not positive as the same was done under difficult circumstances and that the identification parade was not fair. The Appellant further denied being in possession of the recovered phones and faulted the trial magistrate for not considering his alibi.

20. The prosecution opposed the Appeal stating that all the ingredients of the crime had been proved to the required standards.

Issues for determination

21. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by the Appellant and the Respondent and further upon careful consideration of the law, the following issues arise for determination; -

(a) Whether the Appellant was positively identified.

(b) Whether the DNA evidence adduced by the Prosecution was admissible.

(c) Whether the trail magistrate erred in failing to consider the Appellant' defence of *alibi.*

(d) Whether the prosecution proved the case against the Appellant beyond any reasonable doubt.

(a) Whether the Appellant was positively identified

22. The Appellant contends that the evidence on identification was not sufficient to secure a conviction. He blamed the trial court for relying on the evidence of a single identifying witness and also challenged the manner in which the Identification Parade was conducted.

In the case of **BENARD GITONGA KARANU V REPUBLIC [2019] eKLR** the court observed that

> **"The law on identification is settled by various judicial decisions. In Maitanyi vs Republic, (1986) KLR 196 the Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:**
>
> > **"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".**

15. I have also reminded myself of the guidelines in the case of Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held, inter alia, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

16. Similarly, in the case of Wamunga vs. Republic, (1989) KLR 424 it was held inter alia as follows: -

> **"1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**
>
> **2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."**

In DONALD ATEMIA SIPENDI V REPUBLIC [2019] eKLR the court observed that

"34. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

35. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as: -

> **a) What were the lighting conditions under which the witness made his/her observation?**
>
> **b) What was the distance between the witness and the perpetrator?**
>
> **c) Did the witness have an unobstructed view of the perpetrator?**
>
> **d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?**
>
> **e) For what period of time did the witness actually observe the perpetrator?**
>
> **f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?**
>
> **g) Did the witness have a particular reason to look at and remember the perpetrator?**
>
> **h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?**
>
> **i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?**
>
> **j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?**
>
> **k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?**

36. The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. "

Also see Donald Atemia Sipendi v Republic [2019] eKLR

The identification was by a single witness. In **SAMMY KANYI MWANGI V REPUBLIC [2010] EKLR** the Court of Appeal highlighted the duty of the court in relying on the evidence of a single witness. It 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 and in Abdala bin Wendo & Another v R (1953) 20 EACA 166, it emphasized:

"…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."

23. PW2 testified that he was able to see the Appellant using the bright light of his phone that he used when he was looking at the screen. He stated that he was able to describe his assailants to the police and what they were wearing and that he was also able to recognize the Appellant in the identification parade. The trial magistrate in her judgement based the evidence and the culpability of the Appellant not only on PW1's identification but also on the fact that he was found in possession of some stolen items. To her, the evidence on identification was corroborated by the fact of recent possession.

24. In **Hassan V. Republic [2005] 2 KLR 11,** the Court held as follows, regarding recently stolen goods:

"Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver."

25. In **Yohana Hamisi Kyando v Republic [2019] eKLR** the Court of Appeal observed that

"With regard to the identification of the appellant, we bear in mind the guidelines given in the case of R vs. Turnbull and others (1976) 3 All ER 549, by Lord Widgery C.J. as follows: -

"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

See also Abdalla Bin Wendo vs. Republic 20 EACA 166 at page 168, where it was held as follows:

"Subject to certain 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 the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring 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".

26. PW 2 stated that he saw the Appellant during the robbery and that he was able to describe him to the police. He was also able to identify him at the identification parade. The Appellant denied having the recovered phone. The prosecution evidence of how the same was recovered was cogent and he did not give any explanation as to how he came into possession of the said phones. The fact that he was in possession of the stolen phone a day after the robbery, without credible …… explanation places the Appellant at the scene of the crime and thus corroborated PW1's evidence on identification.

27. With regard to the identification parade, procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act (repealed). The procedure for identification parades were also laid out in the cases of **R V. Mwango s/o Manaa and Ssentale v Uganda.** The rules include the following: -

(i) The accused has the right to have an advocate or friend present at the parade;

(ii) The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

(iii) Witnesses should be shown the parade separately and should not discuss the parade among themselves;

(iv) The number of suspects in the parade should be eight (or 10 in the case of two suspects);

(v) All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

(vi) Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

(vii) As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

28. The Appellant challenged the procedure stating that the same was not fair as the parade did not have persons of similar height as his.

In **John Mwangi Kamau v Republic [2014] eKLR the** Court of Appeal when faced with a similar circumstance observed that:

"On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

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

……

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

18. PW5 (IP Francis) gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. IP Francis testified that the appellant changed his position in the parade when each of the witnesses identified him. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identication parade was properly conducted."

29. PW 11 testified that the police conducted the identification parade of the Appellant and confirmed to the court that the Appellant was positively identified by PW1, PW2. He testified that all suspects in the parade were of the same sex and same approximate age, height and were more than 8 during the parade. He told court that the witnesses were put in separate rooms and did not consult each other. PW2 testified that he identified the Appellant based on his facial features. According to the identification parade reports produced as Pexhibits 15(A) and (b), the Appellant registered his satisfaction with the parade. It is also clear that the Appellant willingly participated in the parade. The issue of his height cannot also stand as PW1 clearly stated that he identified the Appellant on the basis of his facial features and not his height. see **Hamisi Gitonga v Republic [2016] eKLR**.

From the foregoing, it is my finding that the Appellant was positively identified by the complainant as their assailant in the robbery.

b) Whether the DNA evidence adduced by the Prosecution was admissible

30. The Appellant contended that the DNA samples collected from PW9 were collected 13 days after the robbery and defilement and that the report was not produced by a competent maker as prescribed by law. He relied on Section 77(3) and 35 of the Evidence Act. With regard to the dates when the DNA samples were taken, it should be noted that as per Pexhibit 14(b) the DNA sampling was done based on the samples obtained from the accused buccal swabs and C.W's PW9's undergarment that she wore on the date of the alleged defilement. The same was produced to court as evidence and it had visible blood stains and a whitish stain. Therefore, the Appellant's contention that the swab was collected 13 days after the incident cannot stand.

31. With regard to the production of the DNA report by pw 10 an investigating officer, the Appellant insisted that the same ought to have been produced by the maker and failure to do so rendered the same inadmissible. However, it should be noted that there was no objection as to its production during trial. See **Kenneth Mwenda Mutugi v Republic [2019] eKLR.**

32. In the instant suit Pw10 testified that the DNA test Report was done by one Richard Lagat a Government Chemist. He did not lay basis as to why the said Mr. Lagat was not able to attend court and testify. He also did not state if he was conversant with his signature and his line of work as to accord the Appellant an opportunity to cross examine him on the report. It is thus my opinion that the Prosecution herein failed to comply with the provision of Section 77 and Section 33 of the evidence act and thus the trial ought to have regarded the DNA report as inadmissible. It should be noted that the Trial Magistrate based her conviction on the Charge of Gang rape on the DNA report.

In **Amil vs Republic (2012) eKLR**, the Court of Appeal stated that:

> **"The fact of rape or defilement is not proved by a DNA test but by way of evidence."**

In **Geoffrey Kioji vs Republic, Nyeri Criminal Appeal No.270 of 2010** cited in **Dennis Osoro Obiri vs Republic (2014) eKLR**, the Court of Appeal stated that: -

> **"Where available, medical evidence arising from examination of the accused and linking him to defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person … Under proviso to section 124 of the Evidence Act (Cap 80) Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim if the court believes the victim and records the reasons for the belief."**

33. In the instant suit PW9 gave a detailed account of how the three men who robbed them defiled her. A birth certificate was produced to evidence to show that she was 17 years at the time of the incident. PW1 confirmed that there was penetration and that her vagina had lacerations, hymen was broken and that she was bleeding. Although the PW9 stated that she did not see her assailants, it should be noted that the defilement took place at the same time the robbery took place and it was by the same persons. As stated above, the Appellant was placed at the scene of the robbery curtesy of the recent possession of the stolen goods. It is therefore safe to conclude and draw an inference that he was also part of the gang rape. This court finds and holds that evidence adduced by PW9 corroborated with the evidence of recent possession amounted to sufficient proof of the Charge of gang rape and thus conviction of the same still stands despite the DNA tests being rendered inadmissible.

(c) Whether the trail magistrate erred in failing to consider the Appellant' defence of alibi.

34. The Appellant in his defense stated that he was taking care of his father in the presence of his brother DW2 on the night of the robbery. His brother Dw2 testified that indeed their father was sick but in cross examination he confirmed that he was not with the Appellant on the night of the robbery.

In the recent case of **VICTOR MWENDWA MULINGE V R, [2014] eKLR** adopted in **STEPHEN NGULI MULILI V REPUBLIC [2014] EKLR** the Court of Appeal rendered itself thus on the issue of alibi:

> **"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 … 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."**

35. In **GODFREY OLUOCH OCHUODHA V REPUBLIC [2015] eKLR** the court held that

> **"The law is settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. The burden always remains with the prosecution to prove that the accused committed the crime. In this case the appellant did not give notice of his intention to give alibi defence in order for the prosecution to call evidence in rebuttal, the court was therefore left with the task of comparing the alibi defence with the prosecution evidence"**

36. In **KOSSAM UKIRU V. R. (2014) eKLR** Court of Appeal was of the view that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the Appellant's guilt has

been established. The court said -

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

37. In the instant case, the defence of alibi was raised by the Appellant during the defence hearing. He did not in any way raise it during cross examination of the prosecution witnesses. Neither did he issue a notice to the prosecution of his intention to rely on it. It is obvious that the same was an afterthought and as stated the burden of proof lay with the prosecution and due to the fact that the same was raised late they did not have the opportunity to do so. As stated in the case of **MORRIS MUTIE THOMAS V REPUBLIC [2016] eKLR** when a trial court is faced with such a circumstance, the correct approach is for it to weigh the defense of alibi against the prosecution evidence.

38. The evidence tendered by the prosecution was water tight based on the testimony of PW2 and that of recent possession that placed the Appellant at the scene of the robbery. The Appellant's evidence was uncorroborated and in fact doubtful owing to the evidence by DW 2 who could not vouch for the Appellant's where about. This court is in agreement with the learned trial magistrate that the Appellant's defence was doubtful and an afterthought and therefore was properly rejected.

d) Whether the prosecution proved the case against the appellant beyond any reasonable doubt.

39. The Appellant was convicted on the three counts of robbery with violence. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. The offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

> **(a) The offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **(b) The offender is in the company of one or more other person or persons, or**
>
> **c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.**

See **DONALD ATEMIA SIPENDI V REPUBLIC [2019] EKLR**.

40. In the instant case there is credible evidence that the Appellant was in a group of three when they attacked the Complainants and hence executed a common intention. The Appellant and his accomplices were also armed with an axe, a rifle and sword which they used to threaten the complainants. As to whether there was theft, there is as well evidence to that end. The complainants lost money, mobile phones and other personal items. Of these items, a mobile phone belonging to PW3 was recovered from the Appellant a day after the robbery.

41. In the upshot it is the finding of this court that all the ingredients of the offence of robbery with violence against the Appellant were proved. The conviction and sentence of the Appellant was accordingly lawful and safe.

Sentencing

42. The trial Magistrate convicted the Appellant on Counts I, II, III and IV. She sentenced the Appellant to serve 25 years imprisonment for counts 1-III, and for 15 years imprisonment for count IV. The sentences are to run concurrently. This court is satisfied that the sentences given by the trial court are deserved. The appeal herein is dismissed.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE