REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO 117 OF 2017

KIPCHIRCHIR TANUI…….APPELLANT

VERSUS

PROSECUTOR …….RESPONDENT

[An appeal from the original conviction and sentence in Eldama Ravine Principal Magistrate's Court Criminal Case No. 296 of 2011 delivered on the 22nd of March,, f 2013 by Hon. H. M. Kasera, SRM]

JUDGMENT

Introduction

1. The appellant herein appealed against conviction and sentence to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code, and conviction for rape contrary to section 3 (1) (a) of the Sexual Offences Act and for causing grievous harm contrary to section 234 of the Penal Code.

Charges and particulars

2. The Appellant was charged with three counts for offences alleged to have been committed in the same incident as follows:

> **Count I**: Robbery with violence contrary to section 296(2) of the Penal Code, the particulars of which were that he had on the 23rd day of March, 2011 at [particulars withheld] Village in Koibatek district within Baringo County, being armed with a dangerous weapon namely a panga robbed M T Kof one mobile phone make Motorola C 118 valued at Ksh.3,999/= and at the time of such robbery wounded the said M T K.
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> **Count II:** Rape contrary to section 3(1) (a) (b) as read with section 3(3) of the Sexual Offences Act No 3 of 2006, that he on the 23rd day of March, 2011 at [particulars withheld] Village in Koibatek District in Baringo County intentionally and unlawfully committed an act which caused the penetration of his penis into the vagina of M T K without her consent.

There was an alternative charge of indecent act with an adult contrary to section 11(a) of the Sexual Offences Act No. 3 of 2006 that he on the 23rd day of March, 2011 at [particulars withheld] Village in Koibatek District within Baringo County caused his penis to come into contact with the vagina of M T K without her consent.

Count III: Grievous harm contrary to section 234 of the Penal Code that he on the 23rd day of March, 2011 at [particulars withheld] village in Koibatek District within Baringo County unlawfully did grievous harm to MT K

The Evidence

3. The evidence presented before the Court was as follows:

The Prosecution's case

PW1 T K M

> *"My home is in [particulars withheld], I take care of my cattle, I do not know my age. On 23/3/2011 in the evening I was in my house with my herdsman; he used to herd goats, he was called Chirchir; he had worked for me for 3 weeks. At 10.00 pm he came and opened the door, went round the home; I thought he was hungry, I called him though he had eaten. He pushed the door and*

attacked me; I did not hear what he said when he attacked me immediately. My house is a single room. He raped me then cut me, not saying anything. He tore my inner pants and cut me with a panga. It was my panga which was under the bed. He told me he wanted money and phone. He cut me on both shoulders, right shoulder (sees large scar 20 cm long, elbow 18 cm long, wrist about 18 cm long. Left shoulder deep cut about 22 cm, middle left shoulder 15 cm, middle left long and ring finger, 3 cuts one above right eye 2 cuts on the head, cut elbow left ear all wounds. Left knee inner part), he cut me then left me. He took my phone which was on my bed on the pillow. I raised alarm as he cut me, my grandson K came, I told him to call my children on phone; K and S came. They put me on a motor vehicle, I do not remember where they took me. I was admitted in Nakuru Hospital for 3 days, I was brought to Eldama Ravine District Hospital, admitted for 3 days. S my son kept my treatment notes. The police came to see me in Nakuru Hospital. I used to live with S but that day he had come to Ravine."

Cross-examined by accused

"*You were alone that day I did not see you come in with anything, you talked to me. You came to my bed, raped me before you cut me, you asked me for money and phone. You were arrested at home at 10.00 pm."*

PW2 B K

"*I live in Sagasagik Kiptoim, I am a farmer. On 23/3/2011 at 10.30 pm I was asleep in my house, Kipchirchir Tanui came and told me that gogo was killed, I asked him by who and he said he did not know. He had a chimney lantern which was lit, he was alone and I had known him since he was a herdsman in M T home. My house is 200 meters from her home. I went with him to gogo's home the door was not locked, I pushed it open, it is a single room. I asked her what was wrong, she told me Kipchirchir had killed her; she was on the floor almost dead. She was cut on her head, shoulder and hand. She bled badly, her clothes were on but soaked by blood. I asked Chirchir for a phone he gave me gogo's phone which he removed from his trouser pocket, it was Motorola C118. I inserted my sim card and called S and K, gogo's son at 10.30 pm. At 11.00 pm S and K arrived home. I locked accused in a house where he used to sleep, I guarded him from outside. S told me he sent for the chief, Joseph Chepkonga to come arrest the accused. Accused had been in that home for 2 weeks."*

Cross-examined by Accused

"*I saw you that night, you came to wake me up. I was at my home when the incident took place. You told me you killed her."*

PW3 S K K

"*I live in Milimani estate Ravine, home is [particulars withheld], I am a lab technologist currently in Laikipia University. On 23/3/2011 at 10.40 pm. I was asleep in my house in Eldama Ravine, I was called on phone, he told me K called him that my mother had fainted; she was cut and bleeding profusely. I woke up, I had a pick up and left for home. I met K, my brother at Kobil Petrol Station, we reached home at 11.30 pm. We found Bernard Kiprop and Kipchirchir our herdsman. We entered the house found mum on the ground, there was a pool of blood on the floor, she could not talk; the palm was hanging as it was badly cut. She had deep cuts on her shoulder on both hands. We took her blanket put her in it and took her to the motor vehicle. I talked to Kipchirchir told him to take care of the boma. On the way she regained consciousness, she told us that Kipchirchir killed her. We came to Eldama Ravine District Hospital. She was put on drip as the doctors treated her. She again said it is Kipchirchir who killed her. She was taken to Mercy in an ambulance but machines were not in use. We took her to Provisional General Hospital Nakuru. She was taken to the theatre. I called Chief Chepkonga told him that mum said it was Kipchirchir who injured her. We brought her home where she was referred to Eldama Ravine District Hospital where she was being managed for one week. She was not admitted to Eldama Ravine District Hospital. We found Kipchirchir at AP's post in Esageri where the Chief had left him and took him to Eldama Ravine Police Station. We brought gogo to hospital in the clothes that she wore head scarf – MFI - 3, Bed sheet MFI – 8, Flowered Kitenge Skirt MFI – 4, Purple pet cot. There was a panga on the bed with blood stains, it was for my mother MFI – 2. I knew my mum's phone it is a Motorola C118 MFI – 1. She is permanently damaged, she cannot do any work for herself."*

Cross-examined by accused

"*I was not present when the treatment took place. You asked me at the DO's office to forgive you. I did not beat you, you were with Police Officers. Mum identified you."*

PW4 R K K

"*I live in Eldama Ravine, home is in Sagasagik, I do business with my brother in Eldama Ravine. On 23/3/2011 at 10.40 p.m. I was in town, K a neighbour called me on phone; he told me mum was cut. I called my brother S K, we fuelled at Kobil Petrol Station and went home. We found K and Chirchir at home, my mother was on the floor bleeding from the hand, head and neck, She was not talking; her house is a single room. We brought her to Eldama Ravine District Hospital, she gained consciousness on the way to the hospital she said it was Chirchir who hurt her. She was put on drip and referred to Mercy Hospital where we were referred to Nakuru Provisional General Hospital and admitted for 3 weeks later admitted to Eldama Ravine District Hospital."*

Cross-examined by accused

"*It was on 23/3/2011, I was in Eldama Ravine at the time of the incident. My mum said you cut her, you also accepted that you cut her."*

PW5 Dr. Joram Kipsang Marachi

"I work at Eldama Ravine District Hospital as a medical officer. ***I filled P3 form on 11/4/2011 for M T K, 70 years old, sexually and physically assaulted.*** *All her clothes were blood stained and torn. She was very sick looking and not able to speak, had multiple cut on head back and front; several stab wounds on thorax and abdomen, red cut wound on right hand, left knee deep cut. Injuries were less than an hour. Bruises on both libia minora and majora, virginal wall was all bruised. She was penetrated. She was discharged on 13/3/4/2011 from Nakuru but developed dizziness. Outpatient card from Eldama Ravine District Hospital name MT was used as a follow up physiotherapy."*

Cross-examination by accused

"She was cut on the head, chest and leg. I do not know who cut her."

PW6 Joseph Kiprono Chepkonga

"I am Senior Chief Lembus Kiptoim Location, Mogotio Division. On 23/3/2011 at 10.50 pm I was at home sleeping, S K called me told me that he was told that his mother was injured, he was in Eldama Ravine. He told me he wanted to take his mother to hospital. He said they were at Eldama Ravine District Hospital and they were referred to Nakuru Provisional General Hospital; later called to tell me to help him in arresting the herdsman who injured his mother. He referred me to Bernard Kiprop who he said knew where the assailant was. Bernard told me Kipchirchir was sleeping in a room in complainant's compound. We arrested him at 5.00 pm. I asked accused why he cut the lady, he told me he was hearing noises (voices) telling him to kill someone. The room for M was a single room. There was a panga with blood and wet blood on the bed and on the ground. I called for a motor bike so I take the accused to Esageri AP's Camp, and later brought him to Eldama Ravine Police Station, where I wrote my statement. I went with the police to the scene. MFI – 8 flowered bed sheet soaked in blood. I had seen the accused for a short time herding the cattle."

Cross-examined by accused

"I arrested you in the house. I did not beat you. You said the panga was for that family, that your head was telling you to kill someone. I did not see your phone."

PW7 Paul Waweru Kangether

"I hold Bachelors in Chemistry, I work with Government Chemist Department in Nairobi as a government analyst. I have been there for 15 years. On 12/5/2012 at Government Chemist we received from No. 60131 Police Corpl. Sarah Situma of Eldama Ravine Police Station the following items:

-Blood sample of complainant M T K

-Blood sample of accused.

B1 – panga

B2 - cream beige stripped shirt of accused Kipchirchir

B3 – blue underwear of accused

B4 – Multi-coloured flowered light blue red cover

There was a request to analyse the items to determine presence and source of blood stains semen/spermatozoa. On analysis:-

B1 Panga – stained with blood

B2- Shirt stained with blood

B3Underwear – very lightly stained with blood.

B4 – red sheet heavily stained with blood but no semen/spermatozoa.

<u>D.N.A – from panga and shirt of accused had blood of the complainant M T K.</u>

D.N.A on underwear of accused matched blood sample of A2 indicated to be of the accused."

Cross-examined by accused

"I was given blood and items to sample, blood on shirt was of the complainant. Blood on inner wear was yours. I then wrote a

report which I have given to court."

PW8 No. 60131 Corpl. Sarah Serem testified that -

"I am stationed at Ravine Police Station in crime office. I was the Investigation Officer in this case. On 24/3/2011 at 7.00 pm I was on duty in crime office I received suspect Kipchirchir Tanui brought in by Chief Kiptoim/Lembus Location; members of the public were also there. It was said he cut a woman at Sagasagik, the lady was taken to hospital. I was also given a panga. I went to PC Mwangangi in G.K.A 554E to Sagasagik in the home we found 3 houses and a store. We were shown a grass thatched house where complainant had slept that night; photos were taken. It was a single room with 2 beds. There was a flowered bed sheet which had a lot of blood, cream cloth with blood. Blood was on the wall still fresh. Photos were taken for the bed, ground and the house. The house the suspect was sleeping was about 200 metres away. We took blood stained bed sheet, cream head scarf. Petticoat, shirt I took them as exhibit. We went to Provisional General Hospital to see the complainant who was admitted, she was still in theatre; we did not see her. I left my phone number with her son S. On 25/3/2011 S called me at 11.00 am told me his mother was out of theatre. I found complainant heavily bandaged on head and body, arm was on a sling both breasts, ribs, right hand and finger were cut. She gave me her statement in hospital bed, told me that he (accused) raped her before cutting her. They had lived for 23 days as accused was her shamba boy. On 23/3/2011 accused went to graze the animals, he come home earlier than usual asked the accused what was wrong but he kept quiet, complainant went to the kitchen he followed her. Complainant look was fearful, she looked away as she was cooking where accused used to sleep. At 9.00 pm she heard someone push the window, she asked who it was accused said it was him. At 10.00 pm, the door was not open accused had hurricane lamp he took a panga which was in complainant house tore the skirt and petticoat which the complainant wore. The lantern was lit so he saw the complainant. Accused removed his trouser and raped her, then cut her as he ordered to give him money that her sons sent her and her phone. She beseeched him to forgive her but he continued cutting her. He took the phone Motorola C118 Ksh. 3999/=. He pushed her on the ground cut her as he kicked her and left for his house where he was sleeping. I wrote statement of PW2 Kiprop, he gave me the phone he took from the accused. Accused's shirt had blood. I talked to accused he said when he was cutting the lady he heard a voice telling him to kill her."

Cross-examined by accused

"I found complainant was injured, raped and phone stolen. P3 form showed the complainant was raped. You used complainant's panga not your panga. It is you who called Kiprop after you cut her, Kiprop locked you in your house from outside."

4. When put on his defence, the appellant gave an unsworn statement as follows:

DW1 Chirchir Tanui:

"I live in Kisianan, I was a herdsman. I was called from the house where I slept, I was arrested and taken to Police Station. I do not know what happened."

5.In his judgment, the trial court found the charges proved beyond reasonable doubt and convicted the appellant for the respective main counts but in accordance with Judicial Policy in cases where capital offence is charged along other offences, held the other offence in abeyance while sentencing the appellant to death for the offence of robbery with violence. In brief the Judgment of the court delivered on 22nd March, 2013 by Ag. SRM Hon. M. Kasera, was as follows:

"The issue before the court are whether accused violently robbed complainant; whether he raped the complainant and whether he did grievous harm to the complainant.

The evidence by the complainant is that accused asked her for her phone and money. Accused eventually took the phone and kept it in his pocket. It is the evidence of PW2 that accused had the phone in his pocket and he gave it to PW2 to make calls to the complainant's sons. It is clear accused had already taken possession of the phone therefore theft is already proved.

The accused used a panga to injure complainant for raping her. In my opinion actual violence was used on the complainant at the time she was robbed of her phone. I find accused guilty of the offence of robbery with violence as charged in Count 1.

In count II, complainant said she was raped by accused, PW5 Dr. Marachi K. evidence is that the complainant's vaginal wall was bruised. Her labia majora and minora were both bruised. The doctors concluded there was forceful penetration, I have no reason to doubt that.

In count III, the complainant's evidence is that accused cut her with a panga. The P3 indicated complainant sustained multiple cuts on her body in the hands of the accused. At the time of the hearing the court had the privilege to see the stitched wounds. On 11/12/2012 the date for hearing complainant could not raise her right hand which was still in pain. This is roughly 1 year eight months after the incident."

6. The Appellant appealed on the following grounds:

1. That the honourable learned magistrate erred in law when she convicted him in reliance to identification evidence which was far from positive given that:

a) It is on record that it was at night and so dark,

b) PW1 testifies that she identified me by my voice yet voice identification parade was not conducted, and

c) That this was a single witness evidence case.

2. That the honourable learned magistrate erred in law when she believed the examination (medical) evidence whereas the alleged stained blood panga was not recovered in my possession.

3. That the honourable trial magistrate erred in law when passing the life imprisonment sentence when the law requires otherwise.

4. That the sentence was harsh and manifestly excessive in circumstance.

5. That the honourable trial magistrate erred in law when she convicted me in absence of sufficient evidence given that the alleged robbed phone claimed to have been recovered in my possession was not true otherwise the weapon could have also been recovered in my possession.

6. That the burden of proof was shifted to be contrary to the provisions of the law.

7. *That the honourable trial magistrate erred in law when she rejected my sincere defence without my cogent reason.*

WRITTEN SUBMISSIONS

7. The appellant and the DPP filed written submissions in the appeal highlighting their respective contentions as follows:

Appellant's written submissions

1. The appellant contended that the complainant identified the accused as Chirchir not explaining how she got to know the person who was going round her house was the appellant at night and she was alone. When the complainant called him it is not indicated that he responded to enable the complainant to recognize him; the attack was at night hence the likelihood of making mistake.

The Appellant relied on the case of ***Suleiman Otieno Aziz v Republic*** [2013] eKLR which was an appeal from the conviction and sentence of death; the court citing ***Abdallah Bin Wendo & another v. Reginam*** [1953] 20 EACA 166 that evidence of a single witness as to identification must be tested with the greatest care before it forms a basis for conviction, so as to eliminate the possibility of error or a mistake. The extra caution required when considering evidence on visual identification applies more to the evidence of a single witness in difficult circumstances in ***Roria v. Republic*** [1967] EA 583, 584 where Sir Clement De Lestang V. P observed that:

"*a conviction resting entirely in identity invariably causes a degree of uneasiness, and as Lord Gardner, L. C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdict:*

"*There may be a cause in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many at ten – it is in question of identity."*

The sentiments of Lord Gardner were captured in the case of ***Kamau v. Republic*** [1957] EA 139 where it was stated that:

"*The most honest of witnesses can be mistaken when it comes to identification."*

The Kenya Court of Appeal has set out guidelines to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified in ***Cleophas Otieno Wamunga v. Republic*** [1989] KLR 424 as follows:

"*Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges 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* ***Widgery C. J.*** *in the well-known case of* ***Republic v. Turnbull*** *[1976] 3 ALL ER 594 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."*

The court ruled out dock identification to establish whether there was evidence upon which conviction should proceed in ***Gabriel Kamau Njoroge v. Republic*** [1982-88] KLR 1134 where the court held *inter alia* as follows:

"*A dock identification is generally worthless and courts should not place reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the suspect and the police should then arrange for a*

fair identification parade."

In this case, it was urged, no one saw the accused and identified him other than what the complainant said. No evidence was tendered in court with regard to the intensity of light when the identification or recognition of the appellant was made. Court of appeal in ***Dzombo Chai v. Republic*** [2007] eKLR appellant being charged with murder contrary to section 203 as read with 204 of the Penal Code, the court held on identification that:

> "*The court has said in many occasions that the evidence of identification or recognition of an accused person should be tested with the greatest care and should be water tight to justify a conviction. It is also recognized that there is a possibility for a witness to be all mistaken. Further, although evidence of recognition is more satisfactory, more assuring and more reliable than the identification of a stranger, such evidence should not only be credible but also should be free from any possibility of error before it can be relied on to implicate an accused person."*

2. The trial court erred in finding that the accused robbed; no one saw the accused robbing or going to the complainant's house as the complainant alleges. The complainant states that the accused was arrested at 10.00 pm yet the first person to arrive at her house was Kiprop at 10.30 pm. The appellant is the one who told PW2 that the complainant was the one being killed. Complainant stated that she raise an alarm and the appellant went and called PW2 and they went to rescue the complainant together, if he was responsible for the alleged acts he would not have been the first one to call Kiprop (PW2).

3. The complainant was attacked at night and no one saw the appellant committing the offence, as stated earlier the appellant was among the first persons to come to the complainant's rescue.

4. The charge of rape was not proved, the doctor's evidence is doubtful, he indicated that he filled the p3 Form on 11/4/2011, failed to state when he booked the complainant for treatment because he says that the injury in her were less than an hour. The discharge summary was given at Provisional General Hospital where the doctor (PW5) does not work. Evidence tendered in by the doctor cannot be relied on as he was not the one who carried out the treatment and investigation of the assault.

Several documents were sent to a Government analyst in Nairobi to determine the presence and source of blood stains and semen/spermatozoa. The results do not disclose any stains of semen/spermatozoa and the court failed to give reasons for reliance on such evidence to convict. The charges of rape were not proved beyond reasonable doubt to warrant conviction of the accused.

Respondent's written submissions

8. The respondent opposed the appeal and submitted as follows:

> **Identification of the appellant** – PW1 in her evidence stated that although it was about 10.00 pm at night, she was able to identify the voice of the appellant as he had worked for her for 3 weeks before the incident. Pw1 easily identified the appellant's voice as he talked to her. At p. 35 lines 17 and 18 of the proceedings PW1 was very clear and states:
>
> "*He told me he wanted money and phone."*

On cross-examination at page 37 lines 9, 10 and 11 the complainant stated:

> "*You talked to me, you come to my bed. You raped me before you cut me. You asked me for money and phone."*
>
> PW2 stated that it was the appellant who went to his house and informed him that the complainant had been killed. PW2 went to the scene and asked the complainant what had happened the complainant answered that Kipchirchir, the appellant had killed him. The complainant showed that she was very sure of the person who had attacked her. PW2 asked for a phone to call for help and the appellant removed the complainant's phone from his trouser pocket. The phone was identified by the complainant as the one which had been stolen from her. The appellants was unable to explain what he was doing with the complainant's phone. PW2 suspected the appellant as the one who committed the offence and locked the appellant in the house until the police come and arrested him. Complainants stated she had placed the phone on her bed.
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> The fact that the appellant had the complainant's phone proved he was the one who committed the offence, and further reporting to PW2 that the complainant was killed. He does not bother to explain in his defence what the phone of the complainant was doing in his custody.

Issue for Determination

9. Upon considering the evidence before the trial court, the decision in the appeal shall depend on the court's determination on the question of identification of the appellant as the complainant's assailant.

Determination

10. In accordance with the duty of the first appellate court re-examined with minute care the evidence presented before the trial court. See ***Okeno v. R*** [1972] EA 32.

Offence of robbery with violence.

11. The ingredients of the offence of robbery with violence were proved in the attacker's possession of a dangerous weapon, a panga, with which he wounded and cut up the complainant leaving her with multiple cut wounds on the shoulders, head, chest, hand and leg, as testified by PW2, PW3 and PW4 in corroboration of the complainant's testimony. Indeed, the government chemist (PW7) found the blood on the panga to belong to the complainant. Even without medical evidence, there was testimony of the eye witnesses who saw the complainant shortly after the attack as to the injuries sustained by the complainant in the robbery.

12. Theft of the complainant's phone complete the requirement of the ingredient of stealing in robbery with violence.

13. The question of identification of the appellant may be answered with reference to the setting of the complainant's association with the appellant as her herdsman who had worked for her for 3 weeks and who she must have come to know by physical appearance and voice to guarantee positive identification; it was at 10.00 pm in the night and although the source of light by which the complaint saw the attacker is not disclosed by the complainant, PW6 the Investigating Officer and the the fact that the attacker spoke to her made it possible for her to identify him. In addition, in her bouts of consciousness, the complainant told PW2, PW3, PW4 and investigating officer (PW8), three times that it was the appellant who had killed her, obviously not knowing whether she would survive the attack. No reason is shown why she would tell an untruth about her herdsman who had only worked for her for three weeks. Indeed, the appellant was arrested when the complainant's son Sammy PW3 told the Chief that the complainant had said it was the appellant who injured her.

14. There is corroboration with respect to the offence of robbery with violence in the testimony of the neighbour PW2 who when notified by the appellant that the complainant had been killed asked for a mobile phone to call the complainant's son and the appellant had produced from his pocket the complainant's mobile phone which had been stolen at the robbery incident. The fact of recovery of the complainant's phone from the appellant corroborates the complainant's testimony that it was the appellant who had attacked her. In addition, PW7, the government analyst found stains of blood belonging to the complainant on the appellant's shirt presented for analysis as item no. B2.

15. The recovery of the phone was immediately after its theft, when according to the complainant, the neighbour PW2 grandson to the complainant, came to her after upon her calls for help, and according to PW2 after the appellant had about 10.30 pm gone to him to report that the complainant had been killed.

16. The appellant's unsworn statement made no defence; it merely stated that the appellant was arrested and taken to court.

***Count No. II - Offence of rape*.**

17. The prosecution witness PW5 a doctor from Eldama Ravine District Hospital was not the examining doctor and he had in filling the P3 form on 11/4/2011 only relied on documents including Post Rape Care Form and discharge summaries prepared by other doctors at Nakuru Provincial General Hospital and at Eldama Ravine Hospital as to examination of the complainant and the nature of the injuries sustained.

18. In additional, I do not consider that the Post Rape Care Examination Form on which the doctor appeared to have based his entries in the form is a report by a medical practitioner for purposes of section 77 of the Evidence Act as to justify its admission in evidence as such report subject to, if the court so directs under subsection (3) to examination of the report maker. Indeed, the form was not presented as such a report within the provisions of section 77 of the Evidence Act.

19. I do not consider that there is admissible medical evidence of the issue of rape. It is, however, accepted since the 1973 Tanzanian case of ***Republic v. Cheya & Another*** [1973] E.A 500 (per Mfalila, J.) that lack of medical evidence is not fatal to proof of death or injury alleged to constitute an offence. The Court held that:

> *"The two questions for determination at this stage are: first whether Daudi Musa is in fact dead as alleged and second if so what was the cause of his death.* ***There is no medical evidence proving the deceased's death and the cause of it. The post mortem report which the prosecution sought to introduce in evidence was ruled inadmissible even under section 275 of the Criminal Procedure Code because in the first place it was not signed by whoever prepared it and secondly the qualifications of whoever prepared it were not shown on the report. In these circumstances I held that the presumption under section 275 (2) of the Criminal Procedure Code was inoperative. However the absence of medical evidence as to death and the cause of it is not fatal because as I said at that stage post mortem reports primarily are evidence of two things: the fact of death and the cause of it. Therefore it was open for the prosecution to produce and rely on other evidence to establish these two facts.*** *This is what the prosecution strenuously tried to do in this case.*
>
> **……**
>
> *The second question for disposal is the cause of deceased's death. Again in the absence of medical evidence one can only fall back on evidence given by various prosecution witnesses who not only saw the deceased being assaulted but saw him at the hospital and later his dead body."*

20. In ***Kassim Ali v. Republic*** [2006] eKLR the Kenya Court of Appeal at Mombasa considered the issue of lack of medical evidence in the context of sexual offence of rape and held that:

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

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

21. Again, the Court of Appeal in Nairobi in ***Dennis Osoro Obiri v. Republic*** [2014] eKLR cited ***Geoffrey Kioji v. Republic,*** Crim. App. No. 270 of 2010 (Nyeri) where the Court stated:

> *"**Where available, medical evidence arising from examination of the accused and linking him to the 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 accused person.** Indeed, under the 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 alone, if the court believes the victim and records the reasons for such belief."*

22. In convicting the appellant for rape, the trial court relied on evidence of PW5 as follows:

> *"In account 2, complainant herself said she was raped by accused. PW5 Dr. Marachi's sworn evidence is that complainant's vaginal wall was bruised. Her labia majora and minora were both bruised. The doctor concluded that there was forceful penetration. I have no reason to doubt this. I find the accused guilty in Count II and convict him accordingly under section 215 of the Criminal Procedure Code."*

Had the trial court considered that Dr. Marachi was not the examining doctor, and was only relying on notes by other doctors not called to testify, its conclusion might have been different.

23. I find it unsafe to convict the appellant on the evidence of the doctor who, without having examined the complainant, filled the Medical examination form on the basis of examination by another doctor or Clinical Officer whose absence was not explained in terms of section 33 (b) of the Evidence Act to justify the reception of his/her evidence as an exception to hearsay rule. Accordingly, I do not find the offence of rape contrary to section 3 (1) of the Sexual Offences Act proved beyond reasonable doubt.

Count NO. III - Offence of grievous harm

Conviction for a lesser uncharged offence

24. The offence of grievous harm is in my view a lesser offence within the provisions of section 179 (2) of the Criminal Procedure Code for which the Court could convict notwithstanding that the accused had not been charged with the said offence. I do not consider that it was at all useful to charge the appellant with the offence of grievous harm in addition to the offence of robbery with violence in this case whose ingredient included the ***wounding*** of the complainant in addition to the other ingredient of being armed with a dangerous weapon namely, a panga.

Double jeopardy

25. It is not permissible to punish a person more than once for same act which may constitute several offences under different laws. In ***Muiruri v. Republic*** [1973] KLR 87, the Court (Trevelyan & Hancox, JJ.) considered the principle of double jeopardy as follows:

> *"The maxim nemo debet bis vexari pro una et eadem causa and nemo debet bis puniri pro uno delicto have received statutory recognition in section 63 of the Interpretation and General Provisions Act (Cap. 2) which provides:*
>
> ***"63. Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of such laws, but shall not be liable to be punished twice for the same account."***
>
> *In **R. v. Dobbs,** [1951], 18 E.A.C.A. 319, the accused, a district officer, was convicted of stealing, by converstion, some game trophies and also of being in unlawful possession of them and was sentenced on both charges. The Court of Appeal upheld both convictions but set one of the sentences aside because the two offences flowed from the same act and the accused could not twice be punished for it. But then, in **Cosmas Nyadago v. R.** [1955] 22, E.A.C.A. 450 where the accused was charged with, and convicted of, robbery with violence and two counts of assault occasioning actual bodily harm, the court not only set aside the sentences on those two counts but quashed the conviction on them as well saying:*
>
> *"our reason for quashing the convictions on counts (c) and (d) was that, since the violence alleged in these accounts was the same as that alleged and proved in count (b) and since that violence had formed a constituent of the offence for which the appellant was convicted on that count, he could not be punished a second time in respect of these same acts of violence."*

26. To similar effect, the Court in ***Anjononi & Others v. Republic*** [1980] KLR 59, discussed the principle as follows:

> *"Mr. Barasa further submitted with regard to count 2, which charged the second appellant alone with assaulting Joice and causing her actual bodily harm, consisting of a superficial wound from a single panga slash, that harm had not been proved by expert evidence as required by section 48 of the Evidence Act, as the medical witness called by the prosecution was a "Clinical Officer" and not a registered medical practitioner. We do not feel it necessary to deal with this submission, because of our view **count 2***

should not have been brought at all, except possibly as an alternative charge. The violence which was the subject of count 2 was the violence as that relied on by the prosecution as constituting the capital robbery charged in count 1, an offence of which the second appellant has been convicted. If his conviction on count 2 is allowed to stand, the second appellant will have been punished twice for the same act committed in the course of the robbery charged in count 1. *Mrs Chana for the Republic very properly did not support the finding of guilt of the second appellant on count 2. We agree, and quash that finding of guilt and set aside the order of two strokes corporal punishment imposed on him."*

See also ***Henry Kato v. R*** (1960) EA 981 and S***eifu Bakari v. R*** (1960) EA 338.

27. There was, however, evidence in the testimony of the persons, apart for the doctors, who saw the complainant after the incident, that is the neighbour (PW2) to whom the appellant reported the incident, and the brothers sons (PW3 and PW4) of the complainant who came to take her to hospital. The complaint's *'palm was hanging as it was badly cut'* according to PW3 and had *'almost got severed'* according to PW4. The trial Court which had the advantage of seeing the complainant also noted her obvious injuries lasting over one year at the date of the trial, and saying:

"At the time of the hearing the court saw long cuts about 20cm long on complainant's right shoulder, elbow 18cm long, cut around the wrist 18cm lo cut wound. Left should deep cut about 22cm long. Middle left shoulder 15cm long ring finger cm and a cut wound above her right eye all the wounds were stitched."

28. While I find that there is evidence to support the charge for the offence of grievous harm contrary to section 234 of the Penal Code, it was not necessary to charge the third count as the violence relied on in proving the robbery with violence is the same evidence which supports the charge in Count III.

Orders

29. Accordingly, for the reasons set out above, the appellant's appeal on conviction in Counts I is without merit and it is dismissed.

30. The conviction for the offence of rape contrary to section 3 (1) of the Sexual Offences Act is quashed for lack of admissible medical or other evidence to corroborate the complainant's testimony, and or indication by the trial court as to whether the trial court believed the complainant to have been telling the truth to justify a conviction on the uncorroborated evidence of the complainant as the alleged victim under section 124 provision of the Evidence Act.

31. The conviction for the offence of grievous harm c/s 234 of the Penal Code charge in Count III is quashed it not having been necessary to lay the charge which relies on the evidence of violence as with the charge of robbery with violence charge in Count I.

32. However, as regard the sentence, the Supreme Court decision in ***Francis Karioko Muruatetu & Anor. v. R***, [2017] eKLR has found that the mandatory nature of death sentence is unconstitutional. The sentence of death imposed by the trial Court ***'as per the law'***, obviously in consideration that the death sentence is mandatory for the offence of robbery with violence under section 296 (2) of the Penal Code is set aside.

33. Having regard to the heinous acts of the appellant in this case by his brutal and unprovoked attack on the complainant by which she sustained multiple bodily injuries, and guided by the Supreme Court's decision in ***Muruatetu*** supra**,** I reset the sentence to one of **imprisonment for 30 years** from 23rd March, 2013, the date of the sentence by the trial court for the offence of robbery with violence contrary to section 296 (2) of the Penal Code charged in Count I.

DATED AND DELIVERED ON THIS 16TH DAY OF MAY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Gordon Ogolla, Kipkoech & Co, Advocates for the Appellant.

Ms. Macharia Ass. DPP for the Respondent.