REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.72 OF 2014

VINICENT ADACHI LITSWA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in the Principal Magistrate's court at Vihiga (G.A. Mmasi) Ag SPM in Criminal Case No.868 of 2012) dated 14th June, 2014.

JUDGMENT

1. This is an appeal from the conviction and sentence of the appellant by G.A Mmasi Ag Senior Principal Magistrate's Court Vihiga in Criminal Case No.868 of 2012 delivered on 4th June, 2014.

2. **Vinicent Adachi Litswa**, (the appellant), had been charged before that court with two counts. In count 1, the appellant faced a charge of robbery with violence contrary to **section 295** as read with **section 296(2)** of the Penal Code. Particulars being that on the 10th day of April 2012, at Chavakali-Kapsabet junction, in Vihiga County within Western Province, jointly with others not before court while armed with crude weapons namely pangas, robbed (withheld) of her mobile phone make D 500C valued at Kshs.4,500/-, DVD Sony valued at Kshs.3,500/-, DVD LG valued at Kshs.3,500/-, eight bags valued at Kshs.8,000/- sufurias valued at Kshs.1,000/- suit case valued at Kshs.2,000/- and cash Kshs.5,000/- all valued at Kshs.27,500/- the property of (withheld), and immediately after the time of such robbery, used actual violence to the said (withheld)**.**

3. The appellant faced the second count of rape country to **section 3(1)(a)(3)** of the Sexual Offences Act No.3 of 2006 whose particulars stated that on the 10th day of April 2012, at Chavakali-Kapsabet junction in Vihiga County within Western Province intentionally and unlawfully caused his penis to penetrate the vigina of (withheld), without her consent.

4. The appellant pleaded not guilty to both counts and in the ensued trial in which the prosecution called five witnesses and the appellant's sworn statement in defence, the trial magistrate found the appellant guilty and convicted him in both counts. He was then sentenced to suffer death for count 1 and five years sentence for count 2. The sentence for count 2 was left in abeyance view of the sentence in count 1.

5. Being aggrieved, the appellant lodged the present appeal and raised five grounds of appeal and subsequently filed a further supplementary petition of appeal with two grounds of appeal. The grounds of appeal raised in the original petition of appeal are that:-

1. **The honourable Magistrate erred in law in his failure to realize that the two charges were defective.**

2. The learned trial magistrate erred in law as to the burden of proof and failed to properly consider the defence case.

3. The learned magistrate failed to appreciate that the element of the offences were not proved as required under the law (sic)

4. The learned magistrate erred in law in not realizing that the appellant's constitutional rights were breached.

5. The sentence imposed by the court was improper in law and excessive in the circumstances.

The further grounds of appeal in the supplementary record which were numbered as 6 and 7 are that:-

6 The learned magistrate and the prosecution denied the appellant his right to copies of the charge sheet, investigation diary and statements of witnesses.

7. The learned magistrate failed to realize that the case was poorly investigated and the evidence of Lucy and the hotel attendants where the accused was arrested was important.

6. Counsel for both parties agreed to dispense of the appeal by way of written submissions. Consequently the appellant's counsel filed their written submissions dated 22nd October, 2015. The respondent's submissions were filed on 20th November, 2015 . A brief reply by the appellant's counsel was filed on 2nd March, 2016. The court was then asked to determine this appeal on those submissions.

7. In the appellant's written submissions it was submitted, that the learned magistrate did not properly apply the standard of proof and that she also failed to consider the defence evidence, (grounds 2 and 3.) Learned counsel referred to the evidence of PW1, the complainant, pointing out that the appellant never disappeared as was alleged. It was submitted that the appellant had a relationship with the complainant and faulted the court for believing the complainant's evidence as true even when she never informed the police that she knew the appellant when making the report. The learned magistrate was also faulted for not taking into account the defence evidence, for believing the evidence of PW4 yet the circumstances under which PW4 was in could not allow him to positively identify the assailants who were said to have covered themselves and not addressing her mind on why it took so long to have the appellant arrested (on 29th September, 2012), when the offence was committed on 10th April, 2012, yet the appellant and PW1 knew one another.

8. It was strongly submitted that the learned trial magistrate never adequately addressed herself on the question of identification by recognition given that the two eye witnesses, PW1 and PW4, were both victims of the attack who had different accounts on the attack, and never gave identities of the attackers at the first opportunity. Counsel referred to the OB in which PW1 reported the incident without any description of the attackers. It was further submitted that even the offence of rape was not proved since the identity of the person who committed the offence was not disclosed.

9. Counsel relied on a number of decisions on identification including **Francis Muchiri Joseph v Republic Case No.86 of 2014, Ronald Onyando Osoro v Republic Case No.396 of 2008**. In **Peter Okelo v Republic H.C.Cr.A.No.26 of 2011**, the court delt with the issue of **alibi**, saying that the learned trial magistrate never considered the appellants alibi as she ought to have done.

10. Next, counsel moved grounds 4 and 6 together on the rights of the appellant. The complaint raised was that there was delay in hearing the appellant's case which did not start until after one year, and that by the time the appellant was sentenced, he had been in remand for two years. It was submitted that the appellant was entitled to help from the "State," but he was not supplied with witness statements and blamed the trial court for it. Counsel relied on **Article 49(1)(c)**and **50(2)(c)** of the Constitution on the right to communicate with an advocate and facilitation to prepare for his defence; He also submitted that

the appellant was denied his constitutional right to have a copy of the charge sheet, witness statements and investigation diary. It was also submitted that the appellant was not told of the danger of not being represented by an advocate in view of the charge he faced and counsel faulted the court for not ensuring that the accused was assigned by an advocate at State's expense in terms of **Article 50(2)(c)** of the Constitution, and that justice was delayed contrary to **Article 159(1)** of the Constitution.

11. Finally it was submitted in furtherance of grounds 1 and 7 that there was no proper investigations and that had there been one, it would have shown that there was no evidence against the appellant.

12. On behalf of the respondent, it was submitted that the appellant was positively identified by means of light in the house, that the complainants were tied which amounted to violence, that the assailants were also armed, and that the assailants attacked the complainant and also raped her. According to counsel for the respondent, the ordeal took two hours which was sufficient time to enable positive identification. It was out of this identification, coupled with physically being known, that PW1 called the police to arrest the appellant after she had lured him with a promise to buy him a drink. "It was submitted" Counsel submitted that the appellant, who admitted in his defence that he knew the complainant, did not prove his claim that he had differences with the complainant which led to the charges being framed against him.

13. Regarding the appellant's complaint that justice was delayed in his case, Counsel for the respondent argued that the blame could not be assigned to anyone. He also submitted that the appellant was granted bail but failed to raise a surety which did not amount to a denial of his constitutional right. On the issue of statement, it was submitted that the appellant had indeed requested for them and the court directed that they be supplied to him hence there was no indication that they were not so supplied. And on investigations, counsel submitted that, in his view, investigations were conducted and the evidence tendered before court was credible and proved the offence the appellant was charged with. He therefore urged the court to dismiss the appeal.

14. I have considered this appeal, submissions by counsel on both sides and authorities cited. I have also perused the record. This being a first appeal, it is the duty of this court, as the first appellate court, to evaluate the evidence on record, analyse it itself and make its own independent conclusions on whether the findings of the trial court should stand or not, of course bearing in mind that it neither saw nor heard the witnesses testify before the trial court and give due allowance for that. See **Okeno v Republic** [1972] EA 32. In the case of **David Njuguna Wairimu v Republic** [2010] eKLR, the Court of Appeal relying on the holding in **Okeno v Republic**, (supra) held:-

> **The duty of the first appellate court is to analyse and 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 appellate 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 decision."**

15. PW1, the complainant, testified that on the material night at about 10 pm while in her house with (PW4) and a another lady (withheld), three men armed with pangas and who pretended to be police officers entered her house, tied them up and stole assorted items from her house.. According to PW1, one man was short, one of medium height and the third one tall. They were later led out of the house to a forest where the medium sized man raped her, while the short man raped (withheld) after ordering them to lie down. The third man stood guard.

16. After they were through, the robbers ran away leaving their victims to find their way home. The witness told the court that she raised an alarm and people came to their aid. She was given a cloth to cover her nakedness by a lady while a Chief assisted them to get to a police station where the made a report. She told the court that when the robbers entered her house, lights were on and for that reason, she was able to identify the appellant. Later after some months, she spotted the appellant at

Chavakali/Kabsabet road junction where he worked as a conductor, dubbed him that she could buy him a drink and I alerted the police. The police came, arrested the appellant and charged him with the offences for which he was convicted. According to PW1 she knew the appellant and recognised him during the attack, with the help of light and since his face was uncovered. That is why she was able to identify him when she saw him at the stage. In cross examination the witness maintained that she knew the appellant very well and that she had identified him physically on the day of the robbery and rape. She later found out that his name was "Oyoyo".

17. PW2, **No.73404 P.C. Wilfred Kiprono**, told the court that on 11th April 2012, the OCS called him and informed him that a report of robbery and rape had been made to the officer in charge of Chavakali Patrol Base, and that the victims were at Mbale Hospital. PW2 and the OCS proceeded to **Mbale Hospital** where they found two women, PW1 and **L M,** who informed them that they had been attacked, robbed and raped. They were taken to PW1's house where they found the curtains cut into pieces. PW1 told them that she had lost two DVDs, sonny and LG, a suit case of clothes, Nokia Phones, 8 handbags and cash Kshs.5,000/- to the robbers. According to the witness, PW1 told him that she could identify the man who raped her since lights were on during the robbery. PW2 booked the incident in the OB, issued them with P3 forms and recorded their statements. On 29th September, 2012, he was called to Vihiga CID office and informed that one of the suspects had been arrested after PW1 had seen him and reported to the police.. He then charged him with the offences in court.

18. PW3, **Loi Abwana Aguwona,** a clinical officer at Vihiga District Hospital testified that on 10th April 2012, he attended to PW1, a patient aged about 30 years, who had a history of robbery and rape. On examination, the patient had bruises on her face, shoulders and on left upper forearm. On further examination of her genitalia, there was presence of **whitish discharg**e. External genitalia had bruises on labia manora. The witness formed the opinion that the victim had been raped and assaulted. Tests done on high vigina swap showed **pus cells** and **leucocytes** or white cells as a result of infection. Tests for syphilis and HIV were negative. He filled the P3 form on 11th April 2012 at 12 pm. and assessed the degree of injury as bodily harm. Post rape case form was also filled. He produced treatment notebook as PEx2, P3 form as PEX3 and post rape case PEx4.

19. PW4, **Henry Lasinja**, testified that on the material night, he had visited his cousin (PW1), and was in her house with another lady called (withheld) when suddenly, three men entered the house. One of the men wore a long black jacket, and jeans. The attackers wore dark covers, one had black scurf. One was very tall, one of medium heights and the third short. They demanded money and phones as they ransacked their pockets. PW1 gave them money. The robbers took some items from PW1's house and went to (withheld) house where they took some more items. They later frog marched their victims to a maize plantation where they ordered them to sit down. PW1 and (withheld) were raped in his presence when the attackers ran away, PW1 raised an alarm attracting neighbours. They were helped to Chavakali police post where they made a report. The witnesses identified the appellant in the dock as one of the attackers. PW4 told the court that all the three attackers had pangas. According to this witness, the appellant was the tallest of them all and is the one who raped the complainant. In cross examination, the witness maintained that the appellant was the tallest and he was able to identify him on that night by means of light from the electric bulb.

20. PW5, No.62967 **Corporal Sammuel Kimanga**, told the court that on 29th September, 2012 at about 8 am he was called by DCIO, **Ombeto** who instructed him to proceed to Chavakali and contact PW1 which he did. PW1 told him that she had been attacked on 10th April, 2012 by people who were in police uniform. PW1 identified one of the people who attacked her. PW1 pointed out the man at Volcan bar where upon he arrested and took him to Vihiga Police Station and charged him in court.

21. When put on his defence, the appellant gave a sworn testimony. He told the court that he lived at Chavakali and worked as a conductor along Kakamega – Kisumu road, that on 29th September, 2012 he was heading to Kisumu from Kakamega when someone called him on his phone. On reaching Majengo, an agent of Hon Raila Odinga called and requested him to transport some people to a meeting former Prime Minister was holding. Later on that day, PW1 called him and asked if she could go with him to

that meeting, but the appellant declined because the vehicle was full. PW1 requested for some money which the appellant gave her. The appellant further testified that after work, he joined friends including PW1 for drinks after he had failed to get her into hr house where he found a man.

22. He later bought dinner which he ate with PW1. When he was leaving, PW1 wanted to go with him but he declined and gave her some money, which she also declined insisting that she should go with him. They went to another bar where the appellant booked a room for her to sleep but she refused. According to the appellant, PW1 became unruly and broke some bottles forcing him to leave for another room. The appellant testified, that PW1 asked police officers who were in the bar to arrest him, alleging that he knew people who had stolen her goods. The appellant was arrested, taken to Vihiga police station and later charged.

23. In cross examination, the appellant told the court that on 10th April 2012 at 10 pm he was in his house with his wife. He further told the court that PW1 was a friend and they knew one another very well, having been introduced to her by a mutual. It was on the above evidence that the learned trial magistrate found the appellant guilty and convicted him provoking this appeal.

24. In this appeal the appellant's counsel argued grounds 2 and 3 together. The appellant's complaint is that the learned trial magistrate erred in law as to the burden of proof and failed to consider the defence case, while in ground 3, the appellant complained that the learned trial magistrate failed to appreciate that the elements of the offence were not proved. Simply put, the appellant's argument is that the prosecution did not prove its case to the required standard.

25. In a criminal trial the burden of proof is always on the prosecution, and an accused person assumes no responsibility to prove his or her innocence. That is a cardinal principle of law that never shifts, save in exceptional cases. An accused should never be left to prove his innocence. The above principle was well stated in the case of **Republic v Gachanja** [2001] KLR 428, when the court held:-

> **"It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability."**

According to the evidence by the prosecution, the robbery incident took place at night at about 10 pm. PW1 and PW4 who were the eye witnesses were clear on this. They were attacked by three men who entered PW1's house, forced them to lie down, tied them with curtain pieces, ransacked the house and later led them out of the house into the bush where after dividing the loot, raped PW1 and one (withheld). They then ran away after they were through, leaving their victims behind. PW1, PW4 and (withheld), went to hospital for treatment and made report to the police.

26. The appellant has taken issue with PW1's evidence submitting that she never told PW2 who was the first to visit the scene, (her house), that she identified the appellant as one of the people who had attacked them, and further that no description of the attackers was given to the police. He also faulted the trial court for relying on the evidence of PW4 as corroborating PW1's evidence, yet there were material contradictions in their evidence.

27. Both PW1 and PW4 agree that they were attacked by three armed men at about 10 pm. They said that there was light from an electric bulb which enabled them to observe the assailants and Identify them. When the victims were taken to the bush, both PW1 and one (withheld) were raped by two of the assailants. PW1's evidence was that during the attack she did not lie down and as a result, she was hit by the short man who was the commander of the group. After considering the evidence, the learned magistrate concluded:

> **"Having considered this evidence carefully, I do find the evidence of the complainant corroborated by the evidence of PW4 entirely, he has confirmed that he was present when the accused and two others got into the house armed with pangas and they violently robbed**

them. Infact he states that the complainant was beaten by the accused and the other two, when they were demanding for money. ... He also confirmed that he saws the accused tearing the complainant's dress and he raped her as he looked, since he had been tied on the hands He also states that he saw the accused inside the house for almost two hours, and therefore I am convinced that there was sufficient time for PW4 to have identified the accused person ..."

28. From the evidence on record, there is no doubt that there was robbery in the complainant's house committed by three men all armed with dangerous weapons, namely pangas. The robbers used violence against their victims, tied their hands and forced them to lie down. For the offence of robbery with violence under section 296(2) of the penal code to be proved, the ingredients required to exist are; that either the offender was armed with a dangerous weapon; was in the company of others or he used personal violence against the complainant. These ingredients existed in this case to prove count 1.

29. Regarding rape, there was sufficient evidence that the complainant (PW1) was raped by one of the robbers. **Section 3(1)** of the sexual offences Act (No.3 of 2006) defines rape as follows:-

"A person commits the offence termed rape if –

a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs,

b) The other person does not consent to the penetration; or

c) The consent is obtained by force or by means of threats or intimidation of any kind."

30. The evidence of both PW1 and PW4 shows that the person who raped PW1 did so by force. PW1 did not consent to that sexual penetration which brought that sexual intercourse within the definition of rape. Elements or ingredients of rape were therefore present. I am satisfied that elements of the two offences were proved. However, the question that remains is, was the appellant one of the robbers, and did he rape the complainant? That is the main issue in this appeal, and for convenience. I will dispose of the issue of rape first.

31. The complainant's evidence was that she was raped by the appellant whom described as of middle height in that group. This is what PW1 told the court:-

"They took us near chief's office near Chavakali High School, and they sat us at the forest somebody's long tres ... (withheld) was taken a few metres away and the short man took her cloths (sic) and she was naked, and he ordered her to lie on her stomach and he climbed on top of her. I am not sure if he raped her, and then the accused person in court came he took a panga he tore my top... he also tore my panty with a panga. I was left naked. He asked me if I wanted to be raped with a panga or a penis and I lay down and he raped me as my cousin looked while the other man guarded him with a panga. He raped me without a condom. <u>The accused person used to work at the junction as a conductor. I used to see him severally. He has on many occasions shown me which matatu to board at the stage they call him Oyoyo and when they got into the room, I identified him. He was the middle tall man, among the two middle in height</u>. The other two I can also identify them, the tall one I also had seen him severally in September, 2012 in our school and I saw the accused peeping in my house ..." (emphasis)

...

On the same issue, PW4's evidence was as follows:-

"They frogmarched us to a maize plantation, they had a torch one in front, the other one middle

and another one behind ... they ordered us to sit down on a maize plantation ... They started rapping (withheld)and the other woman. She tried to resist and she was hit with a panga. Both were raped in my presence. They tore their cloths ... they ordered us to go and they ran into the bush ... I can identify the three men very well. I can see one of them in court (accused person) I had never seen him before. He was the one guarding standing on the door. The accused herein, the afande was the short one who was very tough and he was beating them. Each of them had a panga. <u>The short one raped the other woman and the accused raped Jackline. The accused person was the tallest among them</u>..." (emphasis)

In cross examination, PW4 stated:-

> **"I saw you on that night, at Jackline's house. I do not know if (withheld) PW1 knows you. (withheld) PW1 told me she knew you before she used to see you at Chavakali-Kapsabet road junction stage. <u>You were the tallest among the three men. I saw you very well... I cannot confuse you with anybody else</u> ..." (emphasis)**

32. PW1's evidence is that she was raped by the appellant. PW4 said the same thing. However their description of the appellant does not agree. Whereas PW1 said the man who raped her was of "**middle height**", PW4 was categorical that PW1 was raped by the **tallest man**" in that group. It is obvious that the two eye witnesses did not agree on the identity and description of the person who raped PW1. Both say they identified him but differ on his description. He was either of **middle height** or the tallest. It could not be both, because rape was committed by only one person. Furthermore, a keen scrutiny of PW4's evidence as recorded, shows that he talked of the accused being both the tallest and the short, whom he said was the "afande". From the above analysis it is clear that the evidence regarding the person who committed rape was contradictory and inconclusive. It was not credible.

33. Although in a trial there are bound to be contradictions and, the court may safely ignore such contradictions if they are not likely to cause injustice I do find that the contradictions herein on the identity and description of the appellant as the person who raped PW1 were material, the evidence was not watertight and it could not be relied on to convict the appellant. The prosecution did not prove the charge of rape against the appellant beyond reasonable doubt.

34. Turning to the charge of robbery with violence, the appellant has argued that the prosecution did not discharge its burden of proof, which means the prosecution did not prove its case beyond reasonable doubt. However, counsel for the respondent has argued that the prosecution proved its case to the required standard. The robbery incident took place at night. Both PW1 and PW4 testified that there was light in the house which enabled them to identify their attackers, particularly the appellant. PW1 told the court that she had seen and known the appellant who worked as a conductor and she identified him on that night. The record of appeal contains an O.B extract of the report made to the police in the morning at about 2.50 am, a few hours after that attack. In the report to the police, PW1 did not mention that she knew any of her attackers. No description of the attackers was also given, not even their mode of dress, and for that reason, the appellant's counsel has submitted that the appellant was not properly identified, hence the prosecution did not prove the charge of robbery with violence.

35. PW1 had the opportunity when making the report, to mention to the police that one of the assailants was a person known to her who worked as a conductor at Chavakali-Kapsabet junction, if indeed she had identified or recognised him during the robbery incident. That is what the Court of ~Appeal had in mind in the case of **<u>George Bundi M'Rimberia v R Criminal Appeal No.352 of 2005</u>** when it held that failure to mention the name (and at least the description) of the assailant at the earliest opportunity, tends to weaken the evidence. Further in the case of **<u>Simiyu & Another v Republic</u>** [2005] I KLR 192 at page 195 the Court of Appeal observed:-

> **"In every case in which there is a question as to the identity of the accused, <u>the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom</u>**

the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity." (emphasis)

The same issue was again considered in the case of **Wamunga v Republic** [1989] KLR 426, where again the Court of Appeal had the following to say on identification by recognition:-

> **"It is strite law that 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 conviction."**

The same court held in **Kiarie v Republic** [1984] KLR 739 **and Nzaro v Republic** [1991] KLR 212, that evidence of identification by recognition at night must be water right to justify a conviction. Again in the case of **Gikondi Kamande v Republic** [2015] eKLR the same court held:-

> **"It is our considered view that failure by PW1 and PW3 to give a description of the appellant or mention his name or state that they were attacked by a person they knew, weakens their testimony. Being a person known to them, PW1 and PW3 should have given the name or description of the appellant as was stated in the case of Moses Munyua Mucheru v Republic Criminal Appeal No.63 of 1987 and Juma Ngondia v R, Criminal Appeal No.141 of 1986 and Peter Njogu Kihika & Another v Republic, Criminal Appeal No.141 of 1986. In Lessaray v Republic 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name."** (emphasis)

And in the case of **Frncis Kariuki Njiru & 7 others v Republic** [2001] eKLR the same court held:-

> **"The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity." (emphasis).**

36. The above principle of law aptly applies to this appeal. Although PW1 said she identified and recognised the appellant on that night out of association with him, where he had even shown her the vehicle to board, this was not mentioned to the police or his description given at the time she made the report of robbery and rape. Moreover, PW4 testified that the attackers had "dark covers," which would imply they had covered their faces which would make their identity difficult. PW4 had not met the appellant prior to that material night, but told the court that he could identify the attackers, and pointed out the appellant in the dock. No identification parade was conducted for the appellant to see if PW4 could pick him out. Any identification by PW4 in court amounted to dock identification which was of no evidential value. There was only one accused and PW4 knew this. He could only point out the man who was in the dock.

37. Although there was light during the robbery, both PW1 and PW4 did not agree whether the assailants had 'covers' or not. This shows that the circumstances were difficult and the two witnesses must have been frightened and disoriented at the time. That fact is clear from the discrepancy in the description of the person who raped PW1. A court of law must therefore take great caution when dealing with evidence of identification by recognition, because there is always a possibility of mistaken identity.

38. The learned trial magistrate never warned herself of the danger of convicting the appellant on the sole of evidence of identification by recognition,; and did not consider the standard of proof in such cases. She failed to consider factors that weakened the evidence of PW1 and PW4 on the identification of the appellant as one of the robbers, and therefore failed to consider the possibility of an injustice being

occasioned to the appellant due to such mistaken identity. Although the appellant raised the defence of alibi, the learned magistrate failed to consider it and either accept or reject it with reasons. This was an error.

39. Another concern raised for consideration in this appeal is the nature of the charge the appellant faced before the trial court. The appellant in his first ground of appeal has argued that the charges were defective. The appellant was charged in count 1 with robbery with violence contrary to **section 295** as read with **section 296(2)** of the Penal Code. The charge clearly was improper. The appellant was charged under two different provisions of law, namely **sections 295** and **296(2)** of the Penal Code. The two sections refer to two different offences and it was wrong for the prosecution to base count one on these two provisions of law.

40. The law on framing charges requires that charges be clear and unambiguous so that the accused understands the nature of the charge he faces to enable him prepare his defence. **Section 134** of Criminal Procedure Code provides:-

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information to the nature of the offence charged."**

41. The prosecution cannot allege commission of two or more offences in a single charge in a charge sheet. This is because, as a matter of fairness, an accused, is entitled to know, without any difficulty, the offence he faces so that he can prepare to mount his defence. Secondly, the court hearing the case should know what the charge before it is so that it can determine the relevant evidence, possible defences, and appropriate sentence upon conviction.

42. Having decided to charge the appellant under **section 295** as read with **section 296(2)** of the Penal Code, this resulted into duplicity which made the charge defective. In the case of **Joseph Njuguna Mwaura & 2 others v Republic** [2013] eKLR, the Court of Appeal referring to the case of **Joseph Onyango Owuor & Cliff Ochieng Oduor v R** [2010] eKLR held:-

> **"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 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." (emphasis)**

43. I therefore find that the charge of robbery with violence that the appellant faced before the trial court as count 1, was defective on account of duplicity, and could not be a basis for conviction.

44. The appellant has also raised a constitutional issue, saying his constitutional rights were violated because he was denied copies of witness statements, charge sheet and investigations diary. It has been submitted on behalf of the appellant that due to failure by the prosecution to give the appellant those documents, he was not facilitated to prepared his defence. The appellant has also complained that his trial took too long to start and conclude which violated his constitutional rights.

45. Once an accused person has been arraigned in court to answer charges, he should be supplied with witness statements and all materials in the prosecution's possession which the prosecution intends to rely on during trial, to enable the accused prepare his defence. The court has a duty to ensure that the accused has been supplied with those documents. On the other hand, the accused has also a duty to inform the court in the event the prosecution fails to supply him with materials he needs for purposes of preparing his defence. Most of all, the accused should be supplied with a copy of the charge sheet to enable him know the charge he faces.

46. **Article 49 (1)(h)** of the constitution provides that an accused person has a right to be released on bond or bail on reasonable conditions pending charge or trial, unless there are compelling reasons not to be released. **Article 50(2)** further provides that an accused person is entitled to a fair trial which includes to be informed of the charge with sufficient detail, to answer it, to have adequate time and facilities to prepare a defence, and to have the trial begin and conclude without unreasonable delay.

47. I have perused the record of the trial court and I am satisfied that the appellant was granted bail and although he remained in remand for failure to raise a surety, that could not be blamed on the trial court or the prosecution. The trial court also ordered that copies of witness statements be supplied to the appellant. I have not seen in the record, any complaint to the trial court by the appellant that he had been denied witness statements or charge sheet by the prosecution. It was incumbent upon the appellant to bring to the trial court's attention the fact that he had not been given the documents he needed to purposes of his defence as ordered by the trial court. If he failed to do so, he cannot blame the trial court in this appeal.

48. On the complaint by the appellant that his trial took long to conclude, I have perused the record and noted that on a number of occasions, he was not produced by prison authorities, while on others both the appellant and the prosecution applied for adjournment on different dates for different reasons. He therefore cannot blame both the court and prosecution for the delay. He too was part of that delay. This ground of appeal has no merit and is disallowed.

49. Finally, the appellant argued that he was entitled to legal representation at state expense since he faced a serious charge, but his constitutional right to such legal representation was violated. The right to legal representation is a constitutional right in certain cases. **Article 50(2)(h)** of the Constitution provides that an accused person is entitled to have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result. It is on this basis that the appellant complains that this was violated

50. This issue has been a subject of litigation and courts have made pronouncements on the same. In the case of **David Njoroge Macharia v Republic, Criminal Appeal No.497 of 2007**, the Court of Appeal held:-

> **"Under the new Constitution, State funded legal representation is a right in certain instances. Article 50(2)(h) provides that an accused shall have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution. However, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view, that in addition to situations where "substantial injustice would otherwise result," persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense."** (emphasis)

51. That issue was again considered by the Court of Appeal in the case of **George Gikundi Munje v Republic** [2015] eKLR, where observed:-

> **"Under the current Constitution, an accused person is entitled to legal representation at the State's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the David Njoroge Macharia v Republic, (supra),**

the Constitution does not set out what constitutes substantial injustice. Chapter 18 (transitional and consequential provisions) of the current Constitution places an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 within four years of the promulgation of the Constitution. It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. Whereas it was the intention of the framers of the Constitution that there be a right to legal representation, we appreciate that the same can only be achieved progressively. Bearing the foregoing in mind, we implore parliament to enact the relevant legislation." (emphasis)

52. It is true that the appellant faced a charge whose punishment on conviction is death. I have also noted from the record that the accused was initially represented by an advocate and at one time he applied for an adjournment to get one, which means he had an advocate and was able to afford one. At the time the appellant's trial began upto the time it concluded, Parliament had not enacted the envisaged legislation, and as observed by the Court of Appeal in **George Gikundi Munyi,** (supra), the right to legal representation could only be achieved progressively. For that reason, legal representation to the appellant was not automatic and as a result, his constitutional right was not violated.

53. Parliament has since enacted the **Legal Aid Act**, 2016, which came into force in May 2016, to operationalise. Article 50(2)(g) and (h) on legal representation. That Act once fully operationalised will take care of the issue of legal representation as contemplated by the Constitution. Before that, those charged with capital offences may have to wait abit longer for that right to be realised.

54. Having carefully considered the evidence on record and re-hashed it myself, I am of the considered view that the evidence fell short of that required in a criminal trial to establish the guilt of the appellant in the two counts. It was unsafe for the learned trial magistrate to convict the appellant on both counts of robbery with violence and rape on the basis of that evidence, which was not water-tight, without the risk of causing an injustice on the appellant. The charge of robbery with violence was also defective.

55 In the result, I allow the appeal, quash the conviction on both counts and set aside the sentences on both counts. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 14th day of July, 2016.

E.C. MWITA

JUDGE