REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 118 OF 2014

CALLEB MUHATIA MUSIONGO & 6 OTHERS....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of

J. Ong'ondo – PM. In Criminal Case No. 854 of 2012

delivered on 22nd August, 2014 at Kakamega.)

JUDGMENT

INTRODUCTION

1. The appeal herein arises from the judgment of the trial court at Kakamega in Criminal Case No. 854/12. The appellants were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code as the first count.

2. The particulars of the offence were that on the 31st March, 2012 at [Particulars Withheld] in East Kakamega District within Western Province, jointly with others not before court while armed with crude weapons namely pangas, hammers and rungus robbed E L L of one laptop make Yashika, radio make Sony, 1 camera make Yashika, Sandwich toaster machine, logbook, large thermos flask, braazilla panga, chopping machine, chipping manual, 25 bags of maize, 150 kgs of fertilizer, torch, sufuria, kettle, sledge hammer assorted clothes all valued at Ksh. 440,000/= and immediately before the time of such robbery used actual violence to the said E L L.

3. The appellants were also charged with a second count of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006 of the Laws of Kenya.

4. The particulars of the charge were that on the 31st day of March, 2012 at [Particulars Withheld] in East Kakamega District within Western Province in association with others not before court, intentionally and unlawfully caused their genital organs namely penis to penetrate the genital organ namely vagina of E L L without her consent.

5. As an alternative to the second count, the appellants were each charged with the offence of committing an indecent act with an adult contrary to section 11 (a) of the Sexual Offences Act 3 of 2006 Laws of

Kenya.

6. The particulars of which are that on the 31st day of March, 2012 at [Particulars Withheld] in East Kakamega District within Western Province in association with others not before court, intentionally and unlawfully caused their genital organs namely penis to contact the genital organ namely vagina of E L L without her consent.

7. The appellants pleaded not guilty to the consolidated charges and they were tried and thereafter convicted and sentenced to death as provided for in law. Francis Imbuka was the only one who was acquitted on all the charges.

The appeal.

8. Being aggrieved and dissatisfied by the judgment of the trial magistrate the appellants filed their various appeals which were consolidated as one and Appeal No. 118/2014 was agreed to be the lead file. The grounds of appeal on the lead file are:-

1. The learned trial magistrate erred in law and fact in convicting the appellant on a charge of robbery with violence contrary to section 296 (2) of the Penal Code when the ingredients of the offence thereunder had not been proved against the appellant to the standard required in law or at all;

2. The learned trial magistrate erred in law and fact in convicting the appellant on a charge of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006 when the ingredients of the offence thereunder had not been established against the appellant to the standard required in law or at all;

3. The learned trial magistrate failed to properly or at all address herself on the issue of identification and she erred by ruling that the appellant had been identified when the evidence of PW1, the sole identifying witness was not lucid clear or watertight and when the alleged identification was done under circumstances of great shock, fright and fear which conditions did not favour accurate identification or at all and when it was evident such identification or recognition was not free from the possibility of error as PW1 even if honest, which is denied, could have been, as indeed she was mistaken;

4. The learned trial magistrate erred by failing to properly warn herself of the dangers inherent in the testimony of a single witness and/or she failed to keep in mind or follow or be guided by such warning and she erred by convicting the appellant on the evidence of a single identifying witness and in the absence of any supporting evidence and she failed to consider that the appellant was not charged as an alias;

5. The learned trial magistrate erred by convicting the appellant on charges of robbery with violence and gang rape in the absence of cogent, proper, conclusive, credible and admissible medical evidence and she erred by relying on medical evidence that was inadmissible, unreliable, shaky and of no evidential value;

6. The learned trial magistrate erred by convicting the appellant when the evidence of record was scanty, inconsistent, uncorroborated and incredible and she erred by closing her mind to the many contradictions in the prosecution case which contradictions should have been put to the appellant's benefit but she instead came up with speculations, excuses and explanations to seal or wish away the loopholes in the prosecution's case;

7. The learned trial magistrate fatally shifted the burden of proof and she erred by merely restating the testimony of the prosecution witnesses which she just adopted and believed and erred by dismissing out of hand and/or ignoring or totally failing to consider the defence of the appellant which was credible and tenable and her decision was evidently pre-determined and biased;

8. The learned trial magistrate had a pre-determined mind and exhibited bias by rejecting an application by the prosecution to withdraw their case the appellant for no good reasons but instead proceeded and convicted the appellant in the absence of evidence linking the appellant to the commission of the offence;

9. The learned trial magistrate erred in law by amending and reviewing her judgment without even indicating what erred necessitated the review and her action amounted to sitting on appeal and or reversing her own judgment which was unlawful, unprocedural, irregular and improper and rendered it a nullity.

10. The learned trial magistrate's judgment neither contained the issues or points for determination nor the findings thereon and the reasons for such findings and her decision and conviction was unsafe, improper, biased and indefensible and the sentences meted out were irregular, improper, unjust, vindictive, excessive and unlawful.

9. The appellants want the appeal allowed, conviction quashed and the sentences set aside and/or modified.

Submissions.

10. The appeal was canvassed orally by counsel for the appellants. The 1st and the 2nd appellants were represented by Akwalla Advocate and the 3rd to 7th appellants by M/s. Ondieki Advocate. The state on the other hand was represented by Mr. Oroni from the O.D.P.P.

11. Mr. Akwala submitted that the circumstances leading to identification were not conducive because according to the complainant's testimony she was attacked at night while she slept.

12. She was attacked by a number of people who frightened her to the extent that she urinated on herself and in the circumstances she couldn't identify them. He submits that the complainant did not mention the names of her attackers or describe them to anybody even the authorities she reported to.

13. He maintains that she didn't identify her attackers. He adds that all the accused persons were neighbours to the complainant and they were arrested one month after the incident and no explanation was given.

14. He further submits that the charge of gang rape which the trial court upheld was not proved. There was no proper investigation of this case carried out and that it was PW2 who conducted the investigations.

15. He also maintains that the burden of proof was shifted to the appellants whose testimonies were not considered. He adds that the trial court had its mind set on this case thus the conviction of the appellants. He wants the appeal allowed.

16. Mr. Ondieki for the 3rd to 7th appellants also maintained that the complainant did not mention the names of her attackers in her 1st report – OB 54 of 31/3/2012 but in OB NO. 2 of 25/4/2012. He further submitted that the evidence of the I.O and PW1 contradicted on whether or not PW1 could know her attackers.

17. He adds that the circumstances for identification were not conducive. He also submits that on the count of gang rape, PW1 reneged on her earlier testimony that she took a bath. He adds that papers allegedly stuffed in her (PW1's) genitals and then removed were not produced.

18. He also submits that the letter from the ODPP which sought for the withdrawal of the case herein dated 20th November, 2012 was ignored by the court and that the trial court showed bias and interest in the case. He also adds his voice on the issue of investigation and maintains that no investigations were

done in this case.

19. Mr. Oroni for the state submitted that the state conceded to the appeal. He stated that the conviction was unsafe. He added that the complainant did not state how she identified her attackers and in her report to the police on 31st March, 2011 she never mentioned the names of her attackers even after stating that she knew them for over 12 years.

20. He also submits that the appellants were arrested on 15th April, 2012 a month after the attack and how the appellants are connected to the attack is a mystery.

21. He explains that the prosecution did not wish to proceed with the case and sought to withdraw the same to enable further investigations but the trial court declined. He maintains that all charges could not stand, and that conviction was improper and the prosecution was uncalled for. He urges this court to quash the conviction.

22. Being a first appeal this court's duty will be to re-evaluate the evidence afresh and draw its own independent finding/conclusion, bearing in mind that it neither saw nor heard the witnesses testify. See the cases of **Okeno vs. Republic [1972] E.A. 32, Soki vs. Republic [2004] 2 KLR** and **Kimeu vs. Republic [2003] 1 KLR 756**.

The prosecution case.

23. The prosecution called a total of nine (9) witnesses. PW1 who is the complainant explained to the trial court what happened to her on the 31st of March, 2012.

24. She was alone in her house when she was attacked by armed robbers who broke into her house at about 11 p.m. while she was asleep. According to her testimony, the armed robbers had crude weapons i.e. pangas, crow bars and a hammer and she was able to see them because they had torches with them which they used.

25. She identified the 2nd accused Daudi who she told the court was carrying a panga and a torch. She claims that Daudi was the one ordering her around and he was the one who asked her for her phone. He was speaking in Kiswahili and said "**leo ni leo**" as he demanded money from the complainant.

26. She also claimed in her testimony that she was able to identify accused 6 Shisiali and accused 3 Luke. Since they did not switch off their torches she used the light thereof to identify them.

27. She claimed that she often rode on Luke's motor cycle and that she knew his voice well. While all these were going on other attackers were assaulting her, they even raped her in the ordeal. She has explained in detail in her testimony to the trial court how the attackers raped her and what they did in the process.

28. She claims to have also identified the voice of Absalom. She makes mention of accused 6 Shisiali who she claims took plastic bags and pushed them into her vagina saying he wanted to see if her husband had had sexual intercourse with her.

29. She also claimed that it was the 5th accused person Masiongo who urinated on her body claiming that she was proud for no reason. Accused 1 by the name Miheso removed the jank bottles from her mouth and vagina and said in Kiswahili "Msimsumbue sana mtombe tu vile mkubwa alisema." She claims that Daudi then raped her, followed by Masiongo Accused 4 and in total she claims to have been raped by 5 people.

30. She managed to remove the bed\sheet she had been blindfolded with after the attackers had left. She then went to her worker's house (Alex) and inquired why he was not helping her. He told her that all the while he was also harassed and his door was closed from outside.

31. After opening his door she explained to Alex what had happened to her and they then sought for help from a neighbour where she was able to contact the area chief Isaac Makomere by phone and she explained to him her ordeal. She also called her husband and her brothers who came and took her to hospital at about 6.00 a.m.

32. She was taken to Kakamega General Hospital. She produced treatment records MFIP 1 (a), (b),(c) the P3 form MFIP 2 (a), Post rape care form MFIP 2 (b). The things stolen from her house were 25kgs of maize, fertilizer 150kg, hybrid maize, sufurias, poles, clothes etc.

33. She claimed that she didn't have any grudge with Absalom accused 8 and that the attackers went with the bottles which they tortured her with. She also removed the polythene bags that had been inserted in her private parts. She explained that she was referred to Kisumu for further treatment and that she has to wear napkin so that the urine does not drip.

34. On cross-examination by Mr. Ondieki she explained to the court that the police took away the stone used to hit her door. She reiterated that her attackers were about 20 in number and that she identified them with the help of the light from the torches which they had switched on.

35. She also explained how she could hear them speak and how DAUDI was saying in Kiswahili "**LEO NI LEO**". She maintained that she could identify Daudi's voice as she knew it well. She went to the police on 31st March, 2012 at 2 p.m. where she claims to have given a report of all the persons she identified.

36. The name of accused 1 was John Makotsi Daudi Yohana, accused 2 Peter Shisiali accused 6 Luke Reuben, accused 3, Miheso Muhanda, Masiongo Muhanda Masiongo Lingore, Absalom Lipeya Bosco Joshua who was not in court.

37. She explained the reasons why she didn't give the names of the accused persons to the police in the first report but she told them that she knew them by their looks and names.

38. On cross-examination by the 7th accused she told the court that the reason she could not give names was because they could kill her. She also claimed to have been threatened.

39. PW2 Z L Z the husband to the complainant herein told the trial court how she received the message of the attack on his wife from her brother one I L and the action he took.

40. He saw his wife at the Kakamega Provincial Hospital where she told him of what happened to her and what was stolen. He also explained to the trial court what he observed when he reached his house and confirmed PW1's testimony that she had been attacked by robbers and things stolen from the home.

41. He filed a report at the police station and followed up the matter by doing his own investigations which revealed that it was Franco who had gone to collect some items near his compound which he (PW2) had recovered after the robbery.

42. PW3 Issack Magomere Imbwaga, the area Assistant Chief [Particulars Withheld] sub location confirmed having received a call from the complainant on the 31st March, 2012 at around 4.30 a.m. informing him that she had been attacked by thugs. He called the in-charge Ilesi AP camp and informed them. The following morning he visited the scene and observed what had happened.

43. PW4, Imbwaga Moses Achesa told the trial court about the 7th accused person how he was injured and taken to hospital after being attacked. He identified the items PW2 had recovered in his home as the ones he had bought for the 7th accused who was his watchman.

44. PW5, PATRICK MABIRA, a Senior Clinical Officer in charge casualty Kakamega Provincial Hospital explained the contents in the P3 form for E L the complainant who visited the hospital on 31st

March, 2012 with a history of assault by a group of people. He examined her and on part, he classified the offence as rape.

45. He produced the P3 form which was marked as exhibit P3 (a). He couldn't produce the Post Rape Care Form because it was done by someone else. He didn't make any findings as to who specifically raped PW1.

46. PW6 Corporal David Sugut No. 69947 visited the scene of crime and recovered a brazillian panga and a twisted metal rod from the 8th accused's house. He prepared an inventory which was signed by the 8th accused's wife and other police officers and 3 villages. The exhibits were rejected by the trial court after Mr. Ondieki raised an objection.

47. PW7 Sergeant Lucy Waithera No. 64192 investigated the case herein. She visited the scene together with the OCS and saw what had happened. She saw the stone used by the attackers and the inner door which she observed had been forced open. She listed the items that she recovered and produced them as exhibits and recorded the statements by the complainant.

48. On cross examination he told the court that they visited the scene of crime 23 days after the incident and they did not perform an identification parade because the accused persons were well known to PW1 and PW2. She explained further on the correspondence she received from the O.D.P.P.

49. PW8, Dr. Ogalo Jenneby Winson a medical officer stationed at Kakamega Provincial General Hospital examined the complainant who complained of rape sexual ordeal and having hotness of body and lower abdominal pain.

50. He made a diagnosis of a pelvic inflammatory disease with a history of being sexually assaulted. He produced the medical records casualty No. 12358 exhibit 1 (b).

51. On cross-examination, he explained that he took the history from the patient and went further to explain what medical procedures he undertook and the treatment. He also explained at length his observations and the effects of the polythene and bottle that were inserted in the complainant's private parts.

52. PW9, DUNCAN MURUGWA also stationed at the Provincial General Hospital testified that he also had a chance to examine the complainant E L after an intern clinical officer had seen her and requested for lab tests.

53. He further explained the tests he undertook and the observations he made and the treatment he gave. He produced the treatment notes as exhibit P (1) (a). He also produced section 2 (b) of the Post Rape Care form which part he filled.

54. On cross-examination by Mr. Ondieki, he explained who an intern is and what he/she does. He also went into detail on his observations and treatment of the complainant. The prosecution closed its case after recalling PW1 and PW7 who produced items mentioned earlier during the proceedings.

Defence case.

55. The accused were found to have a case to answer and were placed on their defence. All the accused persons gave sworn testimonies and called no witnesses. They all denied the allegations that they committed the crime as alleged.

56. DW2 John Makotsi Muhanda claimed that from March through April, he was working with an NGO. He admitted that he knew the 2, 3, 4, 5, 6 and 8 accused persons but maintained that they did not meet to commit any offence. He also admitted that there was a security concern in the area which prompted the O.C.S. and PW3 to call a meeting which he attended. The meeting was to establish a community policing group but he claims that he was not a member of the policing group.

57. He added that his name did not appear in E L L's statement dated 5th April, 2012 (i.e. MFI D 1) and her further statement dated 23rd April, 2012. He also produced OB 54/31/3/12 and OB 2/25/4/12 and points out that his name was not mentioned therein.

58. He also made mention of the letter from the ODPP and added that there was no identification parade conducted and no items were recovered. He concludes his testimony by stating that there was no description of the robbers.

59. The testimonies of the other accused persons were more or less the same as that of DW1. They confirmed that they knew each other except for the 7th accused person. Their names were not in the first report and no recoveries were made.

60. They were arrested about 24 days after the incident. They were working with the Administration Police from Ilesi on the 31st March, 2012 till about 9.30 p.m. Except for the 1st, 4th and 7th accused persons the rest were members of the community policing.

Determination.

61. I have considered the arguments made by counsel for the appellants and the prosecution as well as the evidence before the trial court. There are four issues for determination that have been raised in this appeal.

- **The first is whether there was a positive identification of the appellant.**

-***Secondly, whether in the initial report or first report their names were mentioned.***

- ***Thirdly whether there was sufficient consistent and credible evidence to convict the appellants for the offence of robbery with violence and gang rape and lastly***

- ***whether there was non-compliance with section 169 of the Criminal Procedure Code.***

62. On the issue raised of the positive identification of the appellants, this court notes that the evidence of identification by PW1 is the only evidence that put the appellants at the scene of the crime alleged to have been committed.

63. PW1 in this respect testified that she was able to identify the robbers who entered her house and had their torches on. The robbery took place at about 11.30 p.m. and though it was dark, the torches used by the robbers helped her identify them.

64. She testified that the torches were being flashed in the room randomly as the robbers demanded for money and stole other valuables. Apart from the light from the torches PW1 also recognized the voices of her assailants.

65. She made mention of John Makotsi Muhanda who at some point told her assailants in Kiswahili "**Msimsumbue sana mtombe tu vile mkubwa alisema.**" She also mentioned Nahashon Muhatia Mukosi who she claimed talked the most during the entire incident. He talked in Kiswahili **"Leo ni Leo**" and she gave an account of how he raped her.

66. I note that all through the incident herein pw1 says that the attackers had not concealed their faces. She testified that she was able to recognize E C M as he is the one who collected her tin box which contained Ksh. 5,000/= and showed it to someone at the door to confirm the amount.

67. PW1 also explained that she often rode on E's motor cycle to and from her home and that he was a brother in law's son. She also described Caleb Muhand Masiongo who she told the trial court how he was dressed i.e. in black jeans and black jacket.

68. Caleb was the second one to rape her. A L M who she also knew was the one who PW1 says opened his trouser and proceeded to urinate on her saying she was proud for no good.

69. Silas Shisiali is the one who according to PW1's testimony cut up her dress and pushed plastic paper bags into her vagina and who also demanded to know if she had sexual contact with her husband inserting his fingers in her vagina.

70. PW1told the trial court that she didn't see A L M the 5th accused but identified him by his voice. He was the one ordering the men inside her house on what to do. He is her brother in law and she is familiar with his voice.

71. On voice recognition, the Court of Appeal in **KARANI VS. REPUBLIC [1985] KLR 626** help that identification by voice nearly always amounts to identification by recognition. The said court laid down the guidelines when a court is dealing with evidence of identification by voice, and stated that the court should ensure that:-

> *a. the voice was that of the accused;*
>
> *b. the witness was familiar with the voice and recognized it;*
>
> *c. the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.*

72. In this appeal PW1 testified that she knew the appellants for a long time and they are her relatives and neighbours. She has also stated that during her ordeal the appellants were talking to her and also communicating to one another.

73. She has given details of her previous interaction with them. She had talked to them for years and even before the incident and she has shown that she was familiar with their voices.

74. The rape and robbery ordeal took a long time i.e. from 11.30 p.m. to 3.30 a.m. The robbers had all the time in their hands and therefore PW1 could make out who her attackers were.

75. PW1 says that the time the robbers spent at the scene was enough for her to recognize them and even identify them as the robbers took about four (4) hours in her house.

76. However the court has to measure and apply the evidence on identification *vis a vis* the standards set on the establishment of the elements of identification as set out by a galaxy of authorities. The trial court observed PW1's demeanor during trial and found her to be an honest witness who was coming to terms with her ordeal.

77. However on visual identification of the appellants by PW1 this court is reminded of the guidelines. In the case of **MWAURA VS. REPUBLIC [1987] KLR 645** in which the Court of Appeal held 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 of the accused and the quality of light."***

78. In addition it has been stated by the Court of Appeal in **Wamunga vs. Republic (1989) KLR 424** as follows at page 426:-

> ***"..... 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."***

79. The evidence of identification by night must also be tested with the greatest care as provided in the guidelines in **Republic vs. Turnbull [1976] 3 ALL ER 549** and must be absolutely water tight to justify conviction.

80. In the case of **Maitanyi vs. Republic (1986) KLR 198**, the Court of Appeal stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available what sort of light, its size and its position relative to the suspect.

81. In the case of **Anjononi and Others vs. Republic (1976-1980) KLR 1566** it was held that when it comes to identification, the recognition of an assailant is more satisfactory more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

82. Further on the issue of the description and naming of the attackers the Court of Appeal in **Morris Gikundi Kamande Vs. Republic (2015) eKLR at Nyeri** had this to say:

> ***".....It is our considered view that failure by PW1 and PW3 to give a description of the appellant or mention his name or to state 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 appellants as was stated in the cases of Moses Munyua Mucheru – v- R, Criminal Appeal No. 63 of 1987 and Juma Ngondia – v- R, Criminal Appeal No. 13 of 1983 and Peter Njogu Kihika & Another – v- R, Criminal Appeal No. 141 of 1986. In Lesarau – v- R, 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. In R – v- Turnbull, (1976) 3 All ER 551, Lord Widgery C.J. observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger"***

83. **In R – v- Alexander Mutwiri Rutere alias Sanda & 8 Others, (2006) eKLR,** the High Court observed that;

> ***"PW1 and PW2 and several other witnesses claimed they gave the manes of the attackers whom they claimed to know before the incident to the police; the Police Occurrence Book did not have any entry on the names of the attackers, … a reasonable conclusion is that the names of the accused persons were not given because they were not known by the witnesses who therefore lied before the trial court."***

84. In the case of **Simiyu & Another vs. Republic (2005) 1 KLR 192** at page 195, the Court of Appeal faced with facts similar to those in this instant case expressed itself as follows:-

> ***"If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, 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 always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R – v- Kabogo s/o Wagunyu, 23 (1) KLR 50). 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 attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe…. Though the prosecution case against the appellants was presented as one of recognition or visual identification, is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification…. In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory".***

85. Upon re-consideration of the evidence and by taking the judicial precedents and foregone legal guidance into account i come to the conclusion that this was a case which called for in-depth investigations so as to clearly connect the appellants with the commission of the crimes.

86. Applying the aforesaid parameters of identifications the court is of the following views. The circumstances leading to identification were not conducive because according to the complainant's testimony she was attacked at night while she slept.

87. She was attacked by a number of people who frightened her to the extent that she urinated on herself and in the circumstances she couldn't identify them. The complainant did not mention the names of her attackers in her 1st report – OB 54 of 31/3/2012 but in OB NO. 2 of 25/4/2012.

88. The evidence of the I.O and PW1 contradicted on whether or not PW1 could know her attackers. All the accused persons were neighbors to the complainant and they were arrested one month after the incident and no explanation was given.

89. The circumstances for identification were not conducive. The ODPP sought for the withdrawal of the case herein vide letter dated 20th November, 2012 which was ignored by the court thus displaying what the appellants brand as the trial court show of bias in the case.

90. The ODPP conceded to the appeal and stated that the conviction was unsafe on the ground that the complainant did not state how she identified her attackers and in her report to the police on 31st March, 2011 she never mentioned the names of her attackers even after stating that she knew them for over 12 years.

91. The appellants were arrested on 15th April, 2012 a month after the attack and how the appellants are connected to the attack is a mystery. The prosecution did not wish to proceed with the case and sought to withdraw the same to enable further investigations but the trial court declined.

92. DPP maintains that all charges could not stand, and that conviction was improper and the prosecution was uncalled for. The trial court was therefore wrong to convict the appellants on the evidence on identification by the complainant.

93. The conviction was unsafe and the evidence was not watertight. I find that the trial court improperly directed itself on the issue of identification and thus arrived at a wrong conclusion.

94. The issue on identification having succeeded, I do not find it necessary to make a finding on the other issues /grounds. From the foregoing reasons, I do quash the conviction and set aside the sentence of the appellants in the counts in the charge sheet to wit offences of robbery with violence contrary to section 296 (2) of the Penal Code and gang rape contrary to section 10 of the Sexual Offences Act.

95. The appeal is thus found to be meritorious and the same is allowed and appellant are set free unless otherwise held.

SIGNED, DATED and **DELIVERED** at **KAKAMEGA** this **6TH** day of **OCTOBER,** 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

..... for the Appellant.

.....for the Respondent.

.....Court Assistant.