REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. E008 OF 2024

[As consolidated with

CRIMINAL APPEAL NO. E009 OF 2024

and

CRIMINAL APPEAL NO. E010 OF 2024]

JACK GARAGO OKOTH .....1ST APPELLANT

STEPHEN OGUNYA OSOGO .....2ND APPELLANT

MARK GEORGE NYAMWANGA .....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by the Hon. Naomi Wairimu, Senior Principal Magistrate in Migori CMCC CR No. E334 of 2022 on 7.2.2024.

2. The Appellants were charged with two counts. The first count was robbery with violence, contrary to Section 296(2) of the Penal Code. The particulars of the offence were that Appellants, on 24.5.2022 at around 2.00 am at Wiarot village, Kirengo sub-location of Migori County, being armed with dangerous weapons, namely rungus and steel rods, robbed S.A.O of a mobile phone Vivo Y12, Tecno Spark 7, TV Samsung 32 inch, 2 rolls of electric wire, one pair of leather shoes, belt carpet, black bag and cash of Ksh. 140/= all valued at Ksh. 60,840/= and immediately before and at the time of such robbery used actual violence by beating and gang raping the said Sharon Awour Odero.

3. Each of the appellants faced a second count for the offence of rape. The particulars of the offences were that Appellant, on 24.5.2022 at around 2.00 am at Wiarot village, Kirengo sub-location of Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of SAO without her consent.

4. Each of the appellants faced a third count of the offence of gang rape. The particulars of the offence were that the Appellant, in association with [the other appellants], on 24.5.2022 at around 2.00 am at Wiarot village, Kirengo sub-location of Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of SAO, without her consent.

5. Each of the appellants faced an alternative of committing an indecent act with an adult. The particulars of the offence were that the Appellant, on 24.5.2022 at around 2.00 am at Wiarot village, Kirengo sub-location of Migori County, intentionally touched the vagina of SAO, with his penis against her will.

6. The trial court convicted the Appellants and also sentenced them to serve 30 years imprisonment in respect of the offence of robbery with violence and 15 years imprisonment in respect of the offence of gang rape, with both sentences running concurrently.

7. The 1st and 3rd Appellants lodged their respective petitions of appeal as follows:

    a) The plea taken was unequivocal.
    b) That the prosecution's case was marred with discrepancies.
    c) That the sentence was overly harsh.

8. The 2nd Appellant filed an undated Petition of Appeal, which was later amended to include the following grounds of appeal:
    d) The plea taken was unequivocal.
    e) That the prosecution's case was marred with discrepancies.
    f) That the sentence was overly harsh.
    g) No prima facie case was established against him.

9. The second appellant's appeal of the unequivocal plea is dismissed *in limine* since the plea is that of not guilty.

Evidence and Proceeding

10. The first witness was PW1, SAO. It was her case that, on 24.5.2022, she was asleep when, at 2.00 am, she heard a loud bang on the door. Armed men bounced into her house, claiming to be police officers. She identified them because the light was on. The 1st Appellant demanded her phone, money, and her bag. The 2nd Appellant took Ksh. 140/= from her. The 3rd Appellant had a steel rod. He took a panga to her neck and ordered her to cooperate or be killed. He had masked himself but unmasked. They were speaking in Dholuo and Swahili. They ordered her son, 4 years old to sleep or be cut.

11. The 3rd Appellant also went to the room where the house girl, Sara Obote, used to sleep and took a phone, Tecno Spark 7. The 1st and 2nd Appellants were then ransacking the house.

12. She proceeded that the 3rd Appellant then pulled her to the bedroom. He ordered to have sex or kill her. The first to rape her was the 1st Appellant, then the 3rd Appellant, then the 2nd Appellant. She had no pants. While raping her, she realized the 3rd Appellant had a scar on the neck. 1st Appellant had 2 gap upper teeth. She was rapped for 10-15 minutes, and the lights were on. When she pleaded that she had a CS delivery

scar, the Appellant pressed the scar and declared that it was healed. None of the stolen items was recovered.

13. On cross-examination, it was her case that she identified them without police assistance. She attended identification parades. It was the first time she had seen the 2nd Appellant. It was the 2nd Appellant who squeezed her scar. To the 3rd Appellant, she testified that she gave a physical description of the assailants. He wore a muff. He unmasked himself when she said she came from Kasipul.

14. PW2 was Sara Obote. She was asleep in her room when PW1 woke her, crying for help. Then, a robber entered her room wearing a mask and carrying a panga. Another person, wearing a jungle uniform, bounced in as well while a third person entered her room and ordered her to remove her clothes. She recalled that she had a 3-month-old baby.

15. Thereafter, she testified that she heard the robbers ordering PW1 to open her legs, after which they proceeded to sexually assault her. The three assailants then raped PW1 in turns.

16. The assailants then went around the house searching everywhere. They stole the items listed in the charge sheet. She identified the 1st Appellant, who wanted to rape her. On cross-examination by 1st Appellant, she stated that they switched off the light in her room. The 3rd Appellant then

entered and switched on the lights. The 1st Appellant was the last person to enter her room. He had a gap in his mouth and a mark on his face. On cross-examination by the 2nd and 3rd Appellants, she was particular that she did not know them.

17. PW3 was Evans Omondi, PW1's husband. He testified that PW1 called her while crying on the morning of 24.5.2022, informed him of what had transpired, and that none of the items were recovered. He took PW1 to hospital for examinations.

18. PW4 was Inspector Robert Ogolla. He conducted the identification parade. Inspector Zakayo was the investigating officer. On 14.6.2022, he lined up 10 people and conducted an identification parade starting with the 3rd Appellant. He was identified by PW1. George signed off. He also carried out an identification parade for the 2nd Appellant. PW1 positively identified him by touching him. The last person was the 1st Appellant. PW1 identified him. He had a gap on upper teeth. On cross examination, he testified that he gave the suspects option to place themselves at any place in the identification parade.

19. PW5 was Justus Mugati, Clinical Officer at Migori County Referral Hospital. He was stood down for PW1, who was recalled. She reiterated her earlier testimony and stated that on the morning of 24.5.2022, she reported the matter to the

Migori Police Station. The injuries she faced were as a result of raping her.

20. On re-examination she stated that the suspects were arrested a month later. She stated she saw Zakayo as she talked to him. It was her evidence that the robbery took one hour.

21. The matter proceeded before Hon. Munguti who proceeded until 4.05.2023. The matter then proceeded before Hon Wairimu, who took directions under section 200 of the Criminal Procedure Code. The matter then proceeded with PW6.

22. PW6 was Justus Mugati, a Clinical Officer based at Migori County Referral Hospital. He produced the lab request form, PRC and P3 forms in respect of PW1. She had pain on the abdomen and bleeding from the vagina. Bleeding indicated that the incident was forceful.

23. PW7 was No. 235597 CIP Zakayo Ekirapa. He was investigating officer. PW1 came to the police station in the morning of 24.5.2022 to report the crime. The arresting officer was PC Allan, who recorded her statement. Upon his investigations, he narrowed down the 3 suspects before the court, who were charged with the offences stated in the charge sheet.

24. The court delivered a ruling on whether the appellants had a case to answer on 15.11.223. Directions were given under section 211 of the Criminal Procedure Code. All the appellants opted to give sworn testimony, with each not having any witnesses. The court ordered that the proceedings be typed pursuant to the second appellant's request for the testimony of PW7.

25. DW1 was Jack Okoth Garago, the first Appellant. He stated that he worked in a bar. He recalled that on 10.06.2022, he woke up and went to the shamba. He worked until 11 pm. At 11 pm police came to the bar where he was and arrested him. He stated that he did not know the charges before him.

26. DW2, Stephen Ogunya Osogo, the second Appellant testified that on 10.6.2022, he was at the Dalacasa bar at about 11.30 pm. He was arrested and taken to the police station. He was asked for a sum of Ksh. 3,000/= which he did not have, while others were released. On cross examination, he stated that he had never told the court about the money.

27. DW3 was Mark George Nyamwanga, the 3rd Appellant. He went to bury his grandmother on 10.6.2022. He stayed until 9 pm. He went to Dalasca Bar until 1143 pm, where he was arrested. He was asked for Ksh 3,000/=, which he did not have, while others were released. He stated that on 23/24

May 2022, he was at Kibabi University, where he is a medical engineering student. Of course, he forgot that he had identified himself as living in Kioro village in Mukuro location.

Submissions

28. The 2nd Appellant filed undated submissions and submitted that he was not positively identified. He was not informed of the reasons for the identification parade as required under Section 167 of the Evidence Act. The procedure for the identification parade was not followed. He cited **Gabriel Kamua Njoroge v Republic (1982-88) 1 KAR 1134**.

29. The 2nd Appellant also submitted that there were contradictions in the testimonies of the prosecution witnesses; he relied on **Philip Nzaka Watu v Republic (2016) eKLR.**

30. It was also the submission for the 2nd Appellant that the sentences were harsh and excessive as he was a first offender.

31. The 1st and 3rd Appellants submitted that the Respondent did not prove the case against them beyond reasonable doubt. There was witness coaching and fabrication and the 1st Appellant was a victim of a gap on his upper teeth which was an afterthought as it was not reported in the OB. They also submitted that the identification parade was not correctly conducted by PW4.

32. The Respondent filed submissions on 16.12.2025. It was submitted that the trial court properly established, based on the available evidence, that the charge of robbery with violence was proved against the Appellants beyond reasonable doubt. There was no contradiction in the evidence of the prosecution.

33. The Respondent also submitted that the plea was not unequivocal. Reliance was placed on section 2017 of the Criminal Procedure Code to submit that the 2nd Appellant was properly presented before the court and a plea was taken in a language he understood. Reliance was also placed on **Adan v Republic** (1973) EA 445.

34. On discrepancies, it was submitted that there were no discrepancies. The charge sheet was well framed and disclosed the offence. He cited **Philip Nzaka v Republic (2016) eKLR** to submit that if any discrepancies existed, the same did not go to the root of proving the guilt of 2nd Appellant.

35. On sentence, it was submitted that the sentence was at the discretion of the court and was not manifestly excessive. Reliance was placed on **Benard Kimani Gacheru v Republic (2002) eKLR**.

Analysis

36. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in **Pandya vs Republic [1957] EA 336** held as follows:

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

37. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the

appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of **Okeno v Republic [supra]**, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

38. The legal burden is the burden of proof, and is on the prosecution and remains constant throughout. According to established principles, burden of proof rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law

expressly provides otherwise. According to **Halsbury's Laws of England**, 4th Edition, Volume 17, paras 13 and 14:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

39. Brennan J, addressed the standard of proof required in Criminal cases in the case of Re Winship 397 US 358 {1970}, at page 36164 that:

> The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction…Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a

> standard of proof that leaves people in doubt whether innocent men are being condemned.

40. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in **Miller vs. Ministry of Pensions**, [1947] 2 ALL ER 372 had this to say:

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

41. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be**

rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

42. Also, it was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR** as doth:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"**

43. The Appellants lamented that the plea was unequivocal though made no submission on the manner the plea was unequivocal. The court notified the Appellants of their right to legal representation, and they stated that they would proceed without counsel. The plea was then taken in the language they understood. They pleaded not guilty.

44. The court properly invoked Article 50 (2) (h) of the Constitution which provides as follows:

> *"(2) Every accused person has the right to a fair trial, which includes the right-*

(a)…

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

45. The Court of Appeal in **Manyeso v Republic [2023] KECA 827 (KLR)** held thus:

> The appellant did not raise the issue of legal representation either in the trial court and the High Court. The appellant participated in the trial and cross-examined the witnesses, and it was not evident that he suffered any or any substantial injustice. The appellant's rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of the Constitution were not violated.

46. The trial court heard the Respondent's witnesses and also complied with Section 211. The same provides as follows:

> **(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has**

any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

47. The Appellants were placed on their defence. The defenses they gave referred to a different date from the date of the offence. Their defences were not directed at the charges against them. On the other hand, the evidence was cogent in identifying the Appellants in the parade. All caution was taken to ensure that the same was free from error. The court must consider the weight to be attached to the said identification evidence. In the case of **David Mwita Wanja & 2 others v Republic [2007] KECA 324 (KLR):**

> The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long

ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

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

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably

used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

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

.....

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

.....

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

The investigators of the crime in this matter found it necessary to conduct an identification parade for the appellants in order to lend credence and support for the visual identification made by PW1 at the scene of the crime two months earlier.

48. The Appellants' case was that the identification as conducted through the parade was improperly done. For the totality of the identification, PW1 was able to participate in a

parade that is in consonance with Section 156 of the Police Standing Orders, which sets out the Force Standing Orders in regard to identification parades.

49. One of the prerequisites of a fair parade is that the witnesses ought to give a description of the suspect to the police officer in charge of the crime so that the officer arranging the parade picks members to the parade who, as much as possible, fit the description of the suspect. When parades are not arranged or conducted with scrupulous fairness then their evidential value is lessened or annulled (See Order 6(iv) (h).

50. The court correctly warned itself of the dangers of identification as stated in **Kariuki Miri & 7 others –vs- Republic**. The identification parade herein was useful for the Appellants. This is because, even though it was not a contested fact that PW1's room had lights on at 2:00 a.m., there was room for error, as PW1 was clearly terrified at the time. The evidence was clear that the 3 identification parades for the Appellants were properly carried out. They were identified. The evidence was strong on its own. The Appellants were in the house of PW1 at 2.00 am when the lights were on.

51. The evidence of PW1 and PW3 corroborated each other. PW1 placed the 3 Appellants in the *locus quo*. The assailants were armed with a panga and a steel rod. Violence was used

and actually threatened. In the circumstances under which they were used, the weapons were dangerous weapons. The crime was carried in company of others. Section 296(2) of the Penal Code provides as follows:-

> **If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

52. Like the first, the second and third parades were conducted professionally and were contextual. The Appellants were well identified by PW1. They were identified in circumstances that put them in a position to explain the coincidence. Section 111 of the Evidence Act provides as follows:

> (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
> (2) Nothing in this section shall—
> (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
> (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
> (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

53. PW1 thus proved that the Appellants were armed with a dangerous weapon. The charge sheet was proper and not duplex. The weapons were in the hands of one or the other. It matters not whether only one was armed or that not all weapons were carried. The Court of Appeal in **Peter Mwangi Kamau v Republic** [2013] eKLR stated as follows:

> It is also clear from the record that, the robbers were in possession of a pistol, a dangerous weapon and with iron bars which were used to inflict harm upon PW1. Thirdly, they did in fact inflict violence upon PW1 and PW2 in the course

of the robbery. Any one of these three **ingredients was sufficient to support a conviction of the appellant with the charge of robbery with violence.**

54. Therefore, once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation. The Appellant offered no plausible explanation. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation needs only be plausible. In ***Malingi v Republic [1988] KLR 225***. *In* ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008***, the Court of Appeal observed that;

> **Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.**

55. Based on the above analysis, I also find no contradictions in the evidence by the Prosecution as alleged in the Supplementary Record of Appeal. The Respondent tendered overwhelming evidence that implicated the Appellants, and the trial court correctly returned the verdict of guilty on the part of the Appellants as charged. Courts have held that minor contradictions in the glare of overwhelming evidence to

establish the guilt of the Accused person cannot go to the root of disproving guilt.

56. I do not see any alleged discrepancy that could shake the evidence that the Respondent tendered on the whole. In ***DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007*** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."*

57. The next issue was that the defences raised by the appellants differed. On the face of it, they appear to be alibis. The duty to prove falsity of an alibi still remained with the prosecution. The appellant as an accused had no duty to help the state carry out its case.

58. If evidence was tendered that was surprising to the state, they had a chance under section 212 of the Criminal Procedure Code to call for rebuttal evidence. The section provides as follows:

> *If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matte*

59. The question of the rights of the prosecution to receive in advance defence evidence as addressed in the case of **Thomas Patrick Gilbert Cholmondeley v Republic** [2008] KECA 319 (KLR), the court of appeal [R.S.C. Omolo, E. O. O'Kubasu and J. W. Onyango Otieno] posited as follows:

> So, if at the beginning of the trial, the Constitution obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by the Constitution. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence

against it. The question of reciprocity is, therefore, misplaced. …

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake, you must be prepared to be bitten by it." ….

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be

> allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words, there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and the Constitution, wisely in our view, does not give the prosecutors such powers.
>
> They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the Civil Procedure Act, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:
> "To make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." – see section 3A.
>
> There is no similar provision in the Criminal Procedure Code, Cap 75 Laws of Kenya and we think the omission is deliberate. But even if there was such a power with regard to criminal matters, we do not accept that a judge would be entitled to create non-existent rights and confer them upon a party as the learned Judge purported to do here.

60. The appellant was not under duty to disclose his defence before being put on the defence. In any case, the State has a chance to call rebuttal witnesses. However, the appellant

must lay basis for the alibi. The appellants did not cross examine at all on their alibi. It is true that non-disclosure is not fatal but it lessens its efficacy.

61. The first Appellant covered the period after 10.06.2022. They did not say anything on their whereabouts on the date and time of the offence, that is, 24.05.2022 at 00200 hours. The court cannot place on an accused the burden of proof of the falsity or truth of an alibi. However, the first appellant did not set up an alibi.

62. The second appellant also dealt with the period from 10.06.2022, from 2330 hours. There is no evidence of any alibi for the night or morning of 24.05.2022 at 0200 hours. This was not, therefore, an alibi. On cross-examination, he said on 24.05.2022, he was at home with his wife. Neither of these was set up as an alibi.

63. The third appellant attempted to set an alibi about the night of 23/24.05.2022. He said he was at Kibabii University where he was a student. There were no details given to enable the prosecution to invoke section 212 of the Criminal Procedure Code. There has to be a specific place in the university and the year of study that he was in. He had no name of anyone who knew he was at the university. These are matters within his knowledge. I dismiss the alibi as false due to lack of

specificity, and anyone could be called by the prosecution. In the case of **Wachera v Republic [2025] KEHC 11843 (KLR)**, this court posited as follows:

> 43. The court was wrong in blaming the appellant on having the alibi at the tail end. However, the court was correct in finding that these questions were not put to the witnesses. This is important since the offence occurred at home.
>
> 44.The court found that the appellant and the minor lived in the same house. The appellant was the perpetrator. In this case, there are no doubts on who the perpetrator was. It was the Appellant. The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call. With reference to alibi evidence, the court of appeal in Erick Otieno Meda vs. Republic [2019] eKLR stated thus:
>
> "In considering an alibi, we observe that: a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view. b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial. c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court. d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.

45.The first aspect was the alibi defence set out. The state did not find it fit to challenge any of the statements made by the Appellant in relation to the alibi. The state, in its cross examination confirmed the consistence of the defence evidence. The appellant was in their home from 5 pm up to 10 pm when the parties took dinner. This piece of evidence was not impeached at all. The Appellant's evidence remained unrebutted. In the case of Erick Otieno Meda v Republic [2019] eKLR, the Court of Appeal [Asike Makhandia, Kiage & Otieno-Odek JJA] posited as follows regarding an alibi: -In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of Kiarie – v- Republic [1984] KLR, this Court stated:"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable……"

46.In the South African case of S -v- Malefo en andere 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:i.There is no burden of proof on the accused to prove his alibi.ii.If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof

and the accused must be given the benefit of the doubt.iii.An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."iv.If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").v.The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

47.The burden of proving the falsity of an alibi was addressed in case of Victor Mwendwa Mulinge –v- R, [2014] eKLR as follows: -“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution.…”

48.In another persuasive South African case of R - v - Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:‘If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

64. In the circumstances, the appeal on conviction is dismissed for lack of merit. The lower court decision on conviction is affirmed.

65. On sentence, the Supreme Court has propounded guidelines in **Francis Karioko Muruatetu & Another v Republic**

(2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing:

(a) Age of the offender;

(b) Being a first offender;

(c) Whether the offender pleaded guilty;

(d) Character and record of the offender;

(e) Commission of the offence in response to gender-based violence;

(f) Remorsefulness of the offender;

(g) The possibility of reform and social re-adaptation of the offender;

(h) Any other factor that the Court considers relevant.

66. The offence for which the trio were charged attracts a death penalty. Sentencing is an important aspect of judging, as was held in by the Court of Appeal in **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** citing the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71:

> **"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with**

the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

67. The court gave a lenient sentence of 30 years for robbery with violence and 15 years for gang rape. In this case the death penalty is the punishment provided for offence of robbery and 15 years for gang rape. In other circumstances, the death penalty would have been ideal. The mitigation was superficial. The Appellants escaped a death penalty through a lenient sentence. However, the court had not warned the appellant before the appeal was reserved for sentence. In the case of **Joseph Muerithi Kanyita v Republic**

[2017] KECA 387 (KLR), the court of appeal [Waki, Nambuye, & M'inoti, JJ.A.] posited as follows:

> In JJW v. Republic, Cr. App. No 11 of 2011, this Court held that notwithstanding the fact that section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:
>
> It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by

warning him that he risks an enhanced sentence at the end of the hearing of his appeal.

And in Samwel Mbugua Kihwanga v. Republic, Cr. App. No. 239 of 2011, the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.

In this appeal, we are satisfied that the appellant was appropriately warned that should his appeal fail the State would seek enhancement of the sentence on the ground that it was too lenient. The warning took the form of a notice of enhancement of sentence that was duly served upon the appellant's advocate. In view of the fact that the filing and service of the notice is not challenged or otherwise contested, we do not see any basis in law for the contention that the appellant, who was represented by a lawyer, had to be personally served with the notice of enhancement of sentence.

The question still remains whether in the circumstances of this appeal the first appellate court was entitled to enhance the sentence. It is common ground that the sentence imposed by the trial court was a lawful sentence, which was within its jurisdiction to impose.

68. In the circumstances, the three appeals lack merit and are accordingly dismissed.

Determination

69. In the circumstances, I make the following orders:

a) The 1st Appellant's appeal Migori High Court Criminal Appeal No. E009 of 2024 on both conviction and sentence is dismissed.

b) The 2nd Appellant's appeal Migori High Court Criminal Appeal No. E008 of 2024 on both conviction and sentence is dismissed.

c) The 3rd Appellant's appeal Migori High Court Criminal Appeal No. E010 of 2024 on both conviction and sentence is dismissed.

d) Right of appeal 14 days.

a) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **3rd** day of **March, 2026.**

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kihara for the State

Accused 1 – present

Accused 2 – present

Accused 3 – present

Court Assistant – Michael