REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. E029 OF 2024

MOHAMED KAMAU

---------- APPELLANT

-VERSUS-

REPUBLIC

RESPONDENT

(Being an Appeal from the Judgement and Sentence in the Chief Magistrate's Court at Naivasha in Criminal Case No. 2079 of 2018 delivered by the Hon. E.K. Aomo, Principal Magistrate on 8th August 2024.)

JUDGMENT

1. The Appellant was jointly charged with a co-accused for the following offences: -

(a) COUNT 1

(i) **Robbery with violence** contrary to **Section 295 as read with Section 296 (2) of the Penal Code**, particulars being that, on the 29th July 2018, at Lakeview Estate in Naivasha sub-county within Nakuru county, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed ANTHONY KAMOTHO of a pair of men's trekking outdoor shoes, a grey pair of shoes, 2 gold rings, laptop make Mi, a Hewlett Packard laptop, JBL Bluetooth speakers, 5 smart phones make Huawei P9 Plus, P8 Plus, Xiaomi, Tecno, all

valued at Kshs. 100,000/= and cash of Kshs. 42,000/= and at the time of such robbery, threatened to use actual violence on the said ANTHONY KAMOTHO.

(ii) He faced the alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. The particulars were on the 16th August 2018, at Naivasha Police station within Nakuru county, otherwise than in the course of stealing, dishonestly retained a pair of men's trekking outdoor shoes, knowing or having reasons to believe them to be stolen property or unlawfully obtained.

(b) COUNT 2.

(i) **Robbery with violence** contrary to S**ection 295 as read with Section 296 (2) of the Penal Code**, particulars of which were, on the 29th July 2018, at Lakeview Estate in Naivasha sub-county within Nakuru county, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed ANNE NJAMBI KIBE of assorted ladies' dresses, shoes, handbags and a school bag, all valued at Kshs. 50,000/=, the property of the said ANNE NJAMBI KIBE and at the time of such robbery, threatened to use actual violence on the said ANNE NJAMBI KIBE.

(c) COUNT 3

(i) Gang rape contrary to Section 10 of the Sexual Offences Act, particulars being that, on the 29th July 2018, at Lakeview Estate in Naivasha sub-county within Nakuru county, intentionally and unlawfully, in association with others, caused his genital organ namely penis to penetrate the vagina of RODAH NEKESA without her consent.

(ii) He also faced the alternative charge of committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act. The particulars of the charge were that on the 29th July 2018, at Lakeview Estate in Naivasha sub-county within Nakuru county, intentionally and unlawfully, in association with others, caused his genital organ namely penis to come into contact with the genital organ namely vagina of RODAH NEKESA without her consent.

(d) COUNT 5

(i) Gang Defilement contrary to Section 10 of the Sexual Offences Act, particulars being that on the 29th July 2018, at Lakeview Estate in Naivasha sub-county within Nakuru county, in association with others not before the court, intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of W.K. (particulars withheld) a girl aged 12 years old.

(ii) He also faced the alternative charge of the offence of committing an indecent act with an adult contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the charge were that on the 29th July 2018, at Lakeview Estate in Naivasha sub-county within Nakuru county, in association with others not before the court, intentionally and unlawfully did cause his genital organ namely penis to come into contact with the genital organ namely vagina of W.K. (particulars withheld) a girl aged 12 years old.

2. The Appellant pleaded not guilty to the charges and a trial was conducted in which the prosecution called a total of 11 witnesses as follows:

3. **PW1 (Anthony Kamothi Gikunju)** testified that on 29th July 2018 at about 10.00 p.m.**,** while walking near the DCC area in Naivasha, he heard footsteps behind him and was confronted by two men who were shortly joined by two other men. They took his car keys, forced him off the road, ordered him to squat, and one of them fetched his vehicle from where it had been parked. PW1 was compelled to enter the vehicle and was seated between two assailants in the rear seat.

4. PW1 stated that the assailants appeared to know him**,** as they drove directly to his residence where he found other persons already at the compound and the gate had been opened. They demanded money. PW1 went to the bedroom door, his wife opened, and he handed over money, stating he cooperated to save his life.

5. PW1 further testified that he was taken to the sitting room where the attackers woke his wife, three children, the house-help (PW3), and another visiting girl**,** and ordered everyone to lie down. The attackers ransacked the house, stealing assorted items including electronics, gold rings, shoes and clothing. He stated they demanded his PIN and transferred Kshs. 39,000/= from his M-Pesa to 0702102814, registered in the name of Virginia Njoki, before leaving.
6. PW1 stated the ordeal lasted about 1½ to 2 hours**,** and that the attackers used torches and mobile phones and had switched on lights in some rooms. The incident was reported to Naivasha Police Station the same night and the victims were taken to hospital.
7. PW1 testified that when summoned for an identification parade on 16th August 2018**,** he could not identify any suspect because he had not looked at their faces, but he identified his stolen unique trekking shoes (size 9½) on a suspect, stating he had an online purchase receipt.
8. **PW2, Ann Njambi Kibe,** testified that on the same night at about 10.00 p.m.**,** she was awakened by a person who claimed to be a police officer and who was with her husband (PW1). She stated that the electric lights were on, and she saw a man holding a pistol and another ransacking her dressing table. She was led to the sitting room where another person with a briefcase demanded she open it, and money of about Kshs. 35,000/= was taken. She was then ordered to lie down and W.K. was brought to the sitting room.

9. PW2 testified that the attackers demanded PINs and transferred Kshs. 3,000/= from her M-Pesa to 0740-344947**,** registered to Francis Waithanje Mwatha**,** as reflected in her M-Pesa statement. She stated that the assailants kept returning to PW1 to switch on his phone and made calls to Francis to confirm receipt. She also narrated that when her child cried, she was allowed to pick the child from the bedroom, where she met PW3 and heard someone in the shower room.
10. PW2 stated that after the assailants left, they discovered that W.K. and PW3 had been sexually assaulted and that the two had been taken quietly into a room while the rest were held in the sitting room. PW2 testified they called their neighbour/landlord, took the victims to hospital, later obtained M-Pesa statements from Safaricom, and reported to the police. She stated she could not identify the assailants at the parade except the one who wore PW1's imported trekking shoes. In court, she claimed she could identify one attacker who had asked her to show him her daughters and stated that the 2nd accused was the one found wearing PW1's trekking shoes.
11. **PW3, Kapchoge Rhoda Nekesa,** testified that she worked for PW1 and on the night in question she was asleep when she heard people enter the compound. Her door was opened while she was with Josephine, and she saw a man flash a torch while holding a pistol and a knife. He demanded money and her phone, which she gave after resisting. She was dragged by the t-shirt to the sitting room

and ordered to lie down. She stated the attacker had initially covered his face and that electric lights were on.

12. PW3 testified that she saw PW1 lying on the floor, and another assailant asked PW1 whether PW3 was his wife and PW1 said she was the house-help. PW2 and other occupants were brought to the sitting room. PW3 stated she peeped to observe the assailants. She testified one man sat on her back while another demanded more money from PW1. She stated one attacker covered his mouth and nose with a baby feeder, repeatedly readjusting it when it fell.
13. PW3 stated that W.K. and Josephine were taken away and returned after a short while. PW3 was later taken by an assailant holding a pistol into PW1's bedroom where a baby was sleeping and the toilet light was on. PW3 testified she sat on the bed and faced the attacker and was able to see his face clearly when the baby-feeder covering it fell off, aided by the light from the toilet and the attacker's torch.
14. PW3 narrated that she resisted demands to remove her shorts and bend, but the attacker threatened her with a knife and proceeded to sexually assault her. She testified that during the assault she shouted in pain, waking the baby, and thereafter she observed two other armed men behind her as she dressed. She stated she was later allowed back to the sitting room.
15. PW3 testified that after the attackers left, the family discovered the assaults and they went to hospital. She stated she could identify the 1st accused/Appellant as the

assailant who robbed and sexually assaulted her, and that at an identification parade on 14th August 2018 she identified both the attacker wearing PW1's shoes and the person who assaulted her as the Appellant.

16. **PW4, Benjamin Kuria,** a Clinical Officer, produced medical documents (P3 and PRC forms) for W.K. and PW3. He testified that both were examined and findings were consistent with sexual assault, including presence of epithelial and sperm cells and injuries/tears.
17. **PW5, Inspector Ali Ibrahim,** testified that he conducted an identification parade on 16th August 2018 with 10 members and 3 witnesses. He stated PW2 did not identify any suspect, PW3 identified the Appellant by touching him on the chest, and PW1 did not identify any suspect but identified his shoes "AQUATWO" after parade members exchanged shoes/clothes, with the shoes having been worn by the Appellant and then passed to another parade member. PW5 recorded that the Appellant complained his image had earlier been circulated on television but confirmed he was otherwise satisfied with the parade.
18. **PW6, Nelly Papa,** Government Analyst, testified that semen stains were detected on vaginal swabs submitted for W.K. and PW3, but PW3's swab generated an unknown female DNA profile, and W.K.'s generated a mixed profile that could not be resolved. She stated that reference samples for the victims were not submitted.
19. **PW7, PC Eric Njogu Kinandu,** testified that on 14th August 2018, police acted on information and went to a

house with unknown occupants where they found three men, one escaped, and arrested two including the Appellant. He testified they recovered a bag containing what appeared to be a pistol, and on searching the Appellant, found a small pistol concealed in his inner garments, as well as other items including phones, ammunition-related items and an ID card.

20. **PW8, PC Hillary Ng'etich,** similarly testified to the arrest at Kihoto village and recovery of weapons, ammunition, phones and an ID card. He produced several exhibits including a water pistol, a small pistol, live and spent cartridges, phones, and the ID.
21. **PW9, Chief Inspector Kamore,** a Scenes of Crime Officer, testified that he processed two photographs of the arrested persons and issued a certificate. He produced the photos and certificate.
22. **PW10, Cpl Elizabeth Loketet,** testified that she visited the complainants after the incident, recorded statements, and later observed the Appellant at the station wearing "AQUATWO" running shoes. She testified that she took photographs, arranged identification parades, produced Safaricom data placing suspects in the Kihoto area at arrest, and produced M-Pesa statements showing transfers (Kshs. 39,000/= and Kshs. 3,000/=) linked to the incident.
23. **PW11,** a Firearms examiner, testified on examination of firearms and magazines submitted, indicating the classification and capability of the weapons and produced the firearms report and exhibits.

The Defence Case

24. **DW1 (the Appellant)** testified on oath that he was from Nakuru and had travelled to Naivasha on 14th August 2018 to buy vegetables for sale. He stated he was directed to Kihoto area where bhang was being sold and that when police arrived one person ran away leaving bhang behind. He claimed police found bhang in a makeshift house and arrested him, later alleging police planted firearms on him by claiming one was found in his pocket.
25. DW1 stated he was first charged with preparation to commit a felony, placed in cells, and that he borrowed a shoe from a cellmate to go to the toilet, later leaving his own shoes with the cellmate when he was taken to CID offices where photographs were taken. He maintained that the "stolen shoes" did not belong to him, asserting that they belonged to one Joseph Kamau, and that his photograph had been aired on television prior to the parade though he could not prove it.
26. DW1 further relied on the DNA report, contending it did not link him to the sexual offence allegation. He conceded Safaricom data placed him in the arrest area but claimed an alibi that he was in Nakuru on the relevant date due to toothache and treatment, and stated he had other pending cases arising from Naivasha Police Station.

Judgment and Sentence

27. At the conclusion of the trial, the 2nd Accused (the Appellant's co-accused) was acquitted of all the offences

while the Appellant herein was convicted of the offences of robbery with violence in counts 1 and 2 and the offence of gang rape in count 3. He was sentenced to death for the 1st and 2nd counts of robbery with violence and to serve 15 years imprisonment sentence for the third count of gang rape. The sentences in the second and third counts were held in abeyance in light of count 1.

The Appeal

28. Aggrieved by this determination, the Appellant filed the present Appeal vide Petition of Appeal raising nine (9) grounds which were later amended in his amended Grounds of Appeal where he raised 5 grounds as follows: -

(1) THAT the Hon. Magistrate erred in matters of law and fact in that, there was no prima facie case under Section 296 (2) of the Penal Code to found a conviction.

(2) THAT the Hon. Magistrate erred in law and fact as the case lacked proper identification making the conviction unsafe.

(3) THAT the Hon. Magistrate erred in law and fact as the Appellant's cogent defence and mitigation were not given due weight and consideration for a fair trial under the Articles 47 and 50 of the Constitution.

(4) THAT the Hon. Magistrate erred in law and fact as the sentence awarded was harsh,

unfair, unconstitutional and did not consider the sentencing policy guidelines.

(5) ***THAT modern jurisprudence has shown the courts exercising discretion in awarding sentences in line with circumstances presenting.***

29. In response to the Appeal, the Respondent filed Grounds of Opposition dated 5th March 2025 as follows: -

(1) THAT the Prosecution proved its case beyond reasonable doubt. All ingredients were proved.

(2) THAT the Appellant was placed on his defence and the court considered his defence.

(3) THAT the right to legal representation is not an absolute right.

(4) THAT the charge sheet was not defective.

(5) THAT the sentence is appropriate to the circumstances of the offence.

(6) ***THAT the Appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the sentence upheld.***

30. The Appeal was admitted for hearing after which parties took directions to canvass it by way of written submissions which I have keenly read and considered.

Issues for Determination

31. Having considered the grounds of appeal, the entire trial record and the submissions against the law, I find that the following issues arise for determination:
    a) ***Whether the offence of robbery with violence in counts 1 and 2 was proved against the Appellant to the required standard.***
    b) ***Whether the offence of gang rape in count 3 was proved against the Appellant to the required standard.***
    c) ***Whether the sentences meted out by the trial court were proper and lawful.***

Analysis and Determination

Whether the offence of robbery with violence was proved

32. The offence of robbery with violence is anchored in Sections 295 and 296(2) of the Penal Code. **Section 295 provides:**

> **"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 obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."**

33. **Section 296(2) provides:**

> **"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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

34. In ***Johana Ndungu vs. Republic*, Criminal Appeal No. 116 of 1995**, the Court of Appeal stated:

> ***"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the subsection in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296(2)..."***

35. It is settled that the elements in Section 296(2) are disjunctive. In ***Oluoch vs. Republic* [1985] KLR 549**, the Court held that proof of any one of the three ingredients is sufficient to sustain a conviction.

36. From the evidence of PW1, PW2 and PW3, it is not in dispute that property was stolen from the complainants' home. It is equally not disputed that the perpetrators were several in number and were armed with pistols and other weapons. The evidence demonstrated threat of violence and actual violence.
37. The only contentious issue is the identification of the Appellant as the perpetrators of the offence.
38. In ***R vs. Turnbull & Others*** **[1977] QB 224**, the court stated:

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [….]***
>
> ***When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for***

example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

39. The ***Turnbull*** case *(supra)* aptly laid out questions that must be considered in analysing evidence of identification at night as was in this case. The principles were as follows: -

(1). How long did the witnesses have the accused under their observation?

(2). What was the distance between the witnesses and the accused person?

(3). What was the lighting situation?

(4). Was the observation impeded in any way, as for example, by passing traffic or press of the people?

(5). Had the witnesses ever seen the accused person?

(6). If the witnesses knew the accused prior to the current transaction, how often?

(7). If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?

(8). How long elapsed between the original observation and the subsequent identification to the police?

(9). Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?

40. In the instant case, the offence was committed at night. The guiding principle on night identification was laid out in ***Nzaro vs. Republic*** [1991] KAR 212, where the Court emphasized that identification at night must be "absolutely watertight".
41. PW1 and PW2 did not identify the attackers. However, PW3 testified that the attacker's makeshift face covering fell off while inside a lit bedroom, and she had sufficient time to observe him. She later identified the Appellant at a properly conducted identification parade.
42. The parade complied with legal requirements. PW5 testified there were at least eight members in the parade. The Appellant chose his position and confirmed satisfaction with the parade even though he alleged prior circulation of his photograph.
43. I find that there was no evidence to support the allegation that his photograph had been circulated in a manner that prejudiced the parade. If that were so, PW1 and PW2 would likely have identified him.
44. I further find that the doctrine of recent possession applies in this case. In ***Isaac Ng'ang'a Kahiga alias Peter***

***Ng'ang'a Kahiga vs. Republic*, Criminal Appeal No. 272 of 2005**, the Court stated:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction... the possession must be positively proved... first that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly that the property was stolen... and lastly that the property was recently stolen..."***

45. The Appellant was arrested wearing PW1's uniquely identified shoes shortly after the incident. His explanation regarding the shoes was inconsistent and unsupported.
46. I therefore find that the ingredients of robbery with violence were proved beyond reasonable doubt and the conviction in counts 1 and 2 was safe.

Whether the offence of gang rape was proved

47. Section 10 of the Sexual Offences Act provides:

> **"Any person who commits the offence of rape or defilement under this Act in association with another or others... is guilty of the offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."**

48. The essential elements are penetration, lack of consent, participation in association with others, and identification of the perpetrator.
49. PW3 gave direct testimony that she was penetrated. Her evidence was detailed and consistent.
50. Section 124 of the Evidence Act provides:

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim... the court shall receive the evidence of the alleged victim and proceed to convict... if... the court is satisfied that the alleged victim is telling the truth."**

51. The trial court believed PW3 and gave reasons. Medical evidence (P3 and PRC forms) corroborated penetration and injuries consistent with forced sexual intercourse.
52. My finding is that even though DNA did not link the Appellant, DNA evidence is not mandatory in establishing the offence of rape. In ***Fappyton Mutuku Ngui vs. Republic*** **[2014] eKLR**, the Court held that absence of DNA evidence does not invalidate a conviction if other evidence proves the offence.
53. PW3 identified the Appellant as her assailant both at the parade and in court. Her identification was subjected to cross-examination and remained firm. I find that the offence of gang rape was proved beyond reasonable doubt.

Whether the sentence was proper

54. It is trite that sentencing is discretionary. In ***Wagude vs. R* [1983] KLR 569**, the Court stated:

> ***"The Court may interfere with the sentence only if it is shown that it was manifestly excessive."***

55. Section 296(2) provides that the offender "shall be sentenced to death." However, in ***M K vs. Republic* [2015] eKLR**, citing ***Opoya vs. Uganda* (1967) EA 752**, the Court explained:

> ***"The words 'shall be liable on conviction to suffer death' provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment."***

56. I note that the trial court considered the mitigation and the pre-sentence report. The circumstances were aggravated by multiple attackers, prolonged ordeal, use of weapons, sexual violence, and psychological trauma inflicted on the victims.
57. I find no basis to interfere with the death sentence imposed in counts 1 and 2.
58. The 15-year sentence under Section 10 of the Sexual Offences Act is the statutory minimum and was lawful.

Conclusion

59. The prosecution proved beyond reasonable doubt the offences in counts 1, 2 and 3.

60. The identification was reliable and corroborated by recent possession.
61. The sentences imposed were lawful and appropriate.
62. The appeal lacks merit and is hereby dismissed in its entirety.
63. The convictions and sentences are upheld.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5TH DAY OF MARCH, 2026.

HON. W. A. OKWANY
JUDGE
05/03/2026

FOR APPELLANT Present
FOR RESPONDENT Ms Chepkonga
COURT ASSISTANT Karani