

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. E003 OF 2025

SAMSON OTIENO OWALA.....
APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. C.N.C. Oruo (Principal Magistrate) in Rongo PMCSO No. E004 of 2023 delivered on 15.1.2025. The court gave a sentence on the same day as follows:
 - a) Count 1 accused sentenced to 10 years imprisonment.
 - b) Count 2 instead of mandatory life sentence I will sentence the accused to 20 years imprisonment.

2. I have no idea what the second sentence means. Whichever the results, the sentence will have to be refined to avoid creating unnecessary tautology. This is because if a sentence is mandatory, there are no discretions. There is nothing like optional mandatory sentence. It is an oxymoron. The Supreme

Court in addressing mandatory sentences in the sexual offences was of the view that mandatory sentences are mandatory. This was discussed in the case of **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)** where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:

11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed.

12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court's approach and direction in *Muruatetu*, which had to remain binding to all courts below.

13. The Court of Appeal failed to identify with precision the provisions of the Sexual Offences Act it was declaring unconstitutional, left its

declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

3. The Appellant was charged with rape contrary to Section 3(1) (a)(c) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 18.5.2019 at around 0200hrs at Winter area in Rongo Sub-county of Migori County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JVA without her consent.
4. There was also an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act, 2006. The particulars in respect of the alternative charge were that on 18.5.2019 at around 0200hrs at Winter area in Rongo Subcounty of Migori County, the Appellant intentionally and unlawfully by use of his penis caused contact with the vagina of JVA against her will.
5. He was charged with a second count of robbery with violence contrary to section 295 as read with section 296(2) of the

penal code. The particulars were that on 18.5.2019 at around 0200hrs at Winter area in Rongo Subcounty of Migori County, in the republic of Kenya, the appellant robbed JVA, Ksh. 5,700/= and immediately before such robbery threatened to use actual violence to the said JVA while armed with a knife and a metal rod.

6. The Appellant was arraigned on 23.1.2023. The trial court was on leave therefore plea was deferred to 1.2.2023. On the said date the appellant pleaded not guilty on all the charges. A plea of not guilty was consequently recorded.
7. The lower Court heard a total of 6 witnesses. The appellant was placed on his defence. The court considered the evidence and rendered judgment. The Court found the Appellant guilty and convicted him of the offence of rape and the offence of robbery with violence. The Appellant was also sentenced to 10 years imprisonment in respect of count I and 20 years imprisonment in respect of count II, with both sentences running consecutively.
8. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal raised the following grounds:
 1. The learned trial magistrate erred in law and fact in failing to conduct a DNA test in a government chemist to confirm that the same discharges matched.

2. The learned trial magistrate erred in law and fact in failing to consider that there was no direct or circumstantial evidence to incriminate the appellant.
3. The learned trial magistrate erred in law and fact in failing to warn himself on the dangers of relying on a single identifying witness (PW1).
4. The learned trial magistrate erred in both law and fact by inconsistently, inadequately, immeasurably failing to consider the aspect of identification relied upon was not properly tested.
5. The learned trial magistrate erred in law by inconsiderably relying on the aspect of light that was in doubt as to its illumination, strength, proximity and relation to the appellant.
6. The learned trial magistrate erred in law and fact in failing to consider that the alleged descriptions were based on in depth un-corroboration (sic) despite the fact that it was mistaken identity.
7. The learned trial magistrate was inevitably prejudiced by ordering the sentence to run consecutively thus ought to run concurrently as prayed with effect from 24.05.2019

Evidence

8. PW1 was the Complainant. She testified that on 18.5.2019, she was asleep in her house. The appellant entered her house at 0200 am and raped her. Someone woke her up at that hour,

she woke up a bit confused. She was then 7 months pregnant for her husband.

9. She raised her hands and found that there was someone beside her bed where there were security lights, sheers and curtains. The assailant was dressed in jeans long trouser, black short sleeved shirt with white marks. She screamed once. The appellant was holding a knife on her neck and told her that if she screamed, he would kill her.
10. The house had turned on light as she was in the next room and turned it off after dealing with a child who had issues. The complainant could not scream any further. The appellant engaged her on where she worked but did not want to tell her and thus told him that she was business woman.
11. The appellant demanded for money and the complainant pointed to her bag where he took Ksh. 5,000/= and put to his pocket. Her further testimony was that having pocketed the cash, the Appellant approached her and started undressing himself. She pleaded with him that she was 7 months pregnant. She was in her night dress and panty. He forcefully inserted his penis into her vagina. He ejaculated. He wiped himself using her mosquito net and left the room.
12. Dogs started barking. The appellant checked what it was and took a metal rod that he had used to open the door. The appellant left for the door and left. She went and woke up the

maid. She called Nancy and Eric, a boda boda rider who came immediately. Eric told her that he met the assailant leaving the compound and even greeted him. She produced documents for her treatment. In the morning, she reported to Kamagambo Police Station and was referred to Rongo sub-county hospital.

13. On cross examination, it was her evidence that she first met the appellant on 18.5.2019, when he robbed and raped her. The description she gave was that the assailant was tall, English speaking, deep voice, left-handed, the clothes he was putting on. She stated that she could not notice any abnormality. She stated that Celestine Atieno was her maid and was in her room. Eric, a boda boda rider said he saw someone of the description of the Appellant leave the compound. She stated that the assailant lied on her stomach as he raped her.

14. PW2 was Everline Mbaka, a Senior Clinical Officer at Awendo subcounty hospital. She was a graduate of Kisii KMTC with 17 years' experience. In 2019 she was at Rongo sub-county hospital. She examined the complainant. Epithelial and sperm cells were seen. She was pregnant at 28 weeks. There was whitish discharge in the labia. There was evidence of penetration. She found spermatozoa. She produced a discharge summary, Filter Clinic Attendance Card and post rape care form. She also examined the complainant and filled

P3 form. On cross examination, the witness confirmed that PW1 was raped.

15. PW3 was Eric Ochieng Farro, who was a motorcycle rider. He stated that JVA was her customer. He did not know the Appellant before 18.05.2019. He stated that the complainant called him at 2 am on 18.5.2019 that she was unwell and wanted to go to hospital. He thought she wanted to deliver. On arrival, he saw someone come from the fence near the complainant's house. He saw using his motorbike light. The person had a torch, a panga and something that resembled a stick or rod. He was tall and well built. The complainant then told him that she had been raped and described the Appellant. He took the complainant to Rongo Subcounty Hospital and were told to report at Kamagambo Police Station.

16. On cross examination, it was his case that he saw the Appellant pass in the fence and he had a torch. He saw using the torch on his motorbike. He stated that he arrived at the scene after 20 minutes and arrived at the station after 20 minutes. On cross examination by the court, he stated that he saw the appellant at the fence in dark trousers and dark top.

17. PW4 was No. 240887 IP Consolata Omahe. She was present when the identification parade was conducted. 9 persons of similar size, height and colour were present in the identification parade. The Accused was placed between the 1st

and 3rd person. The Appellant was positively identified by the victim. The Appellant was satisfied and signed the report. On cross examination, it was her case that the parade was conducted on 22.5.2019 at 4.00 pm to 4.15 pm.

18. PW5 was Celestine Atieno Nogo. On 18.5.2019, she was working with the complainant as house help. She was living with the complainant. At 2.00 am she heard scream. She thought the complainant was in labor. Later, the complainant went to her room and told her that someone had raped her. She advised the complainant to call Eric, PW3, who was her motorcycle rider. On cross examination, she stated that her child was unwell on the material night. She heard screams and thought the complainant was in labour. She did not identify the appellant.

19. PW6 was No. 70123, PC Albert Nyabando, the investigating officer. He visited the scene and found PW5. An informer called him that he saw the Appellant. They went to his house and recovered a metallic rod and knife. He was present when identification parade was conducted where the Appellant was positively identified by the victim. He produced recoveries as kitchen knife, metallic rod, hacksaw, 2 pangas, spring, wooden stick, padlocks and phone. On cross examination, he testified that PW5 was in the house with the complainant on the material night and time but did not hear anything.

20. The appellant was placed on his defence. After Section 211 of the Criminal Procedure Code was complied with, the appellant offered to give sworn evidence.

21. DW1 was the Appellant. He testified that he was a trained teacher. On 18.5.2019, he delivered milk in Winter area. He visited his step mother around 6.00 pm. He returned home at 1.00 am. He was called to assist the cow to deliver which continued until 3.00 am. He was not at the scene of crime. On cross examination he stated that he was left-handed. The complainant identified him on the date of the identification parade.

Submissions

22. The Appellant filed submissions dated 30.6.2025. It was submitted that the reason for his arrest was not stated. The information before the court was based on pure suspicion and lacked probative value. He cited Section 107 (1) & (2) of the Evidence Act. It was submitted that identification was inadequate. The Appellant was not placed at the scene of the crime. He also submitted that the sentence ought to have run concurrently and not consecutively.

23. The Respondent filed submissions dated 11.11.2025 by which it was submitted that the Respondent proved the ingredients of the offence and the court properly convicted and sentenced the Appellant.

24. It was submitted that the rights of the Appellant under Article 50 of the constitution were observed and it had not been proved that lack of legal representation occasioned any prejudice to the Appellant.

25. On the sentence, it was submitted that the sentence imposed against the Appellant was lawful and there was no basis to interfere with the court's discretion in sentencing. Reliance was placed on **Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR)**. In the case, the court stated as follows:

Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/O Owoura Vs Reginum (1954) 21 270 as follows:-

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial

Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher shewky, (1912) C.C.A. 28 T.L.R. 364."

26. During the hearing the appellant informed the court that he had missing teeth while the person who attacked the complainant had all teeth. This is not how evidence is introduced in a hearing. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:**

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing

submissions but based only on evidence presented.”

Analysis

27. 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.

28. 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.

29. The legal burden is the burden of proof, which remains constant throughout a trial. According to established principles, it 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.

30. Brennan addressed the standard of proof required in such cases, in the **United States Supreme Court decision in 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.

31. 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.

32. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in

favour of the accused person, which can be dismissed with the sentence “of course it is possible, but not in the least probable”, then it can be said in law that the case is proved beyond reasonable doubt. 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.

33. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. The section reads as follows:

382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be

reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

34. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

35. This court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In

Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

2. 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; 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.

36. There are three issues to be determined in this matter, that is:

- a. Whether the charges were proved against the appellant to the required standard.*
- b. Whether the sentences were manifestly excessive.*
- c. Whether the two sentences should run concurrently or consecutively.*

37. It is noted that the appellant filed two appeals being HCCRA No. E007 of 2025 and E003 of 2025. The appeal herein is what

the parties submitted on but relied on grounds of appeal in E007 of 2025.

38. The offences which the appellant was charged were robbery with violence and rape. Rape is set out in section 3 of the Sexual Offences Act. The same provides as follows:

- 1. A person commits the offence termed rape if-**
 - a. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**
 - b. The other person does not consent to the penetration; or**
 - c. The consent is obtained by force or by means of threats or intimidation of any kind.**
- 2. In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.**
- 3. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.**

39. The Appellant challenged the circumstances of identification and maintained that he was not at the scene of the crime on the material day and time. Identification was by PW1 and PW3. There was also an identification parade in which the Appellant was positively identified. The Appellant

did not challenge the identification parade. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, a decision that has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated doth:

The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

40. According to the medical evidence tendered by PW2, PW1 presented evidence of penetration on examination. There was also spermatozoa in her vagina. The testimony of PW1 was corroborated by the evidence of PW2. The identification

parade was based on the description that PW1 presented in relation to the Appellant. He was described as tall and well built. He had a lit torch during the commission of the crime. This evidence was also corroborated by PW3 who testified that he saw the Appellant emerging from a fence at PW1's house minutes after the incident when PW1 called him to take her to hospital.

41. The Appellant was placed on his defence. The defence he preferred was not far from an admission that he was at the scene of the crime. He testified that on the material day, he returned to his home at 1.00 am where he assisted a cow that was delivering till 3.00 am. Notwithstanding, the Respondent retained the burden to prove the allegations against the Appellant beyond reasonable doubt. What the appellant gave was not an alibi defence. It was evidence that placed him in the scene of crime.

42. Other than the descriptions being correct, they matched what the complainant gave and the evidence of PW3. Identification is usually very crucial. The court must be aware of the dangers of identification by strangers, especially voice. However, in this case, the appellant was identified using bed side light. The appellant took his sweet time to rape the appellant and collect money.

43. The appellant was seen by PW3 carrying a panga and a rod. This were later recovered in the appellant's home. He did not challenge the recovery at all. The identification report buttressed the identification. The reports were not impeached. In the case of **Reuben Taabu Anjononi ,Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR)**, the court of appeal [Madan, Law & Potter JJ A)] posited as follows:

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic (unreported)*.

44. For the avoidance of any doubt, the court has to establish the procedure in the identification parade. The same has to comply with the law for it to substantiate identification of the Appellant. According to PW4, 9 persons of same size, height and colour were selected, including the Appellant. In the case of **David Mwita Wanja & 2 others v Republic**

[2007] KECA 324 (KLR), the Court of Appeal [R.S.C. Omolo, P.N. Waki, W.S. Deverell] stated as follows:

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.”

45. For the totality of the identification, PW1 and the Appellant were able to participate in a parade that is in consonance with Section 156 of the Police Standing Orders sets out the Force Standing Orders in regard to identification parades. 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).

46. The parade was thus correctly and lawfully carried out. The appellant was correctly identified by the complainant. There is therefore no doubt in my mind that the appellant was the assailant.

47. This then leaves other ingredients of the two offences starting with rape. PW2 produced documents showing penetration and presence of spermatozoa. It was not necessary to carry out DNA for the discharge once the identification was confirmed. The penetration was confirmed.

It was clear that the consent of the appellant was not obtained.

48. The identification parade herein was useful for the Appellant. The evidence was clear that the identification parade for the Appellant was properly carried out. The appellant was properly identified. The prosecution evidence was strong enough even without the identification parade. The fact that the appellant was left-handed was also noted by the court. On penetration it is immaterial whether the penetration was full or partial. However, in this matter, it resulted in an ejaculation. In **Republic -vs- Oyier [1985] KLR 35** the Court of Appeal observed as follows:

1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.

49. Having proved rape it is unnecessary to deal with the alternative count.

50. On Count II, Robbery with violence, the evidence of PW1 and PW3 corroborated each other and were supported by the identification parade. PW1 placed the Appellant in the locus quo. The Appellant was armed with a knife and metal rod. Violence was used and actually threatened.

51. However, robbery was to be proved before robbery with violence could be established. PW1's case was that the Appellant stole Ksh. 5,000/= which she pointed to him to take from her hand bag, under duress. He took the money. 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. The offence of robbery is set out in section 295 of the penal code as follows:

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.

53. The theft was proved. It is immaterial whether it is Ksh. 5000/= or Ksh. 5,700/= that was robbed. Robbery with violence was a serious crime and the Respondent proved the theft of the money. There was no cross examination on the issue of money. The question of what was stolen was proved.

54. The last aspect was the question of not being informed the right to representation. Article 50(2) (b), (c), (g) and (h) of the Constitution provides as follows:

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

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(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;

55. In this appeal, the applicant was aware of his right under Article 50(2)(h). The court analyzed and found that in this

case, there was no likelihood of substantial injustice resulting. This was because, from the proceedings, the appellant understood the charge facing him, represented himself well, but the facts were heavily against him. In that respect, the court below could not inform him of the right under Article 50(2)(h). In any case no substantial injustice occurred.

56. The second aspect is the question of Article 50(2)(g). The right to choose, and be represented by an advocate, and to be informed of this right promptly. Reliance had been placed in the case of **Ignatious Kibiwot Kitur v Republic [2016] KECA 500 (KLR)**, where the court of appeal [DK Maraga, DK Musinga, AK Murgor] posited as follows:

There is no evidence on record that the trial court informed the appellant of the aforesaid rights before the plea was taken. The question that now arises is whether the failure by the trial court to inform the appellant of his right to legal representation vitiated his conviction and sentence. We do not think so. The appellant unequivocally pleaded guilty to the charge of defiling a child of tender age and even if he had legal representation and had elaborate mitigation made on his behalf, that would not have varied the mandatory sentence that was passed by the trial court.

57. The Court of Appeal again dealt with the question in the case of **Juma v Republic [2023] KECA 40 (KLR)**, where they rendered themselves as follows:

In effect the appellant's claim is that he was not given an advocate to represent him in the trial, and he was also not provided with the prosecution evidence in advance. It is noteworthy that the appellant never raised the foregoing issues with the trial court. He did not ask for counsel and neither is there indication on record that the prosecution failed to supply him with the evidence it sought to rely on. In any case the record shows that the appellant had ample opportunity, which he seized, to cross-examine each of the prosecution witnesses. We are therefore not convinced that the appellant's rights to a fair trial were infringed in the way that he alleges.

58. The Court of Appeal, differently constituted [MK Koome, HM Okwengu, GBM Kariuki] as they were, addressed itself on the rights under article 50 as follows in the case of **Hamisi Swaleh Kibuyu v Republic [2015] KECA 296 (KLR)**:

The rights that are encapsulated in the fifth schedule were meant to be progressively realized and Parliament was given timelines by the Constitution. In respect of the right to fair trial under Article 50, four years was the time-frame given. As this period had not elapsed as at the time of the hearing and disposal of the first appeal in the High Court, the appellant became a victim of the progressive realization of the right to legal representation. That was unfortunate. However, though the ideal position is one where the appellant should have had legal representation, we find on the facts and evidence, there was proof beyond reasonable doubt that

justice was served and the decision reached by the two courts below was correct. In our view, the failure of legal representation did not occasion substantial injustice to the appellant.

59. The thread of the binding decision of this court is that the reading of both the rights under Article 50(2)(g) and Article 50(2)(g) must be read in a manner that breach must cause substantial injustice. The constitution does not envision a situation where there is technical compliance of the constitution to fetish in a way that strict compliance is seen as a form of worship and not delivery of substantive justice. It is clear that the record did not indicate that he was informed of the right to choose. However, it is not correct that the failure to indicate on record is fatal to the matter.

60. It would indeed be proper if the Appellant, charged with an offence whose penalty was death, presented a case that substantial injustice would be occasioned against him. In the case of **Mokaya v Republic** (Criminal Appeal E020 of 2023) [20241 KEHC 4607 (KLR) it was held by W.A Okwany, J that:

"In the instant case, I note that even though the trial Court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant has not charged with a capital offence whose penalty is

death so as to necessitate the mandatory requirement for legal representation, I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation.

61. In this case, I do not see any way in which the fact that the Appellant had no legal representation in the trial court affected his right to a fair hearing. The hearing was done within the tenets of the law and the Appellant was given full opportunity in which he chose the language to use and proceeded to cross examine all witnesses.

62. On sentence, the principles upon which an appellate court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now well settled. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306))”

63. The sentence imposed of 10 years was the minimum mandatory sentence and was proper.

64. Section 296 provides as follows:

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) 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.

65. The proper sentence could have been a death sentence. However, the court granted him a slap on the wrist. I did not warn him of the potential to enhancement. The sentence of 20 years is therefore proper.

66. The next question is whether the sentence should be concurrent or consecutive. The first count is a sexual offence. It should ordinarily have its own sentence. It is irrelevant that the robbery was accompanied by rape. Section 7.13 to section 7.16 of the Sentencing Policy Guidelines, 2023 provide as follows:

7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

7.15 In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.

7.16 In determining the most appropriate term of imprisonment, the court should follow the policy directions in paragraph 23.7 to 23.9 of these guidelines.

67. Clause 7.17 provides for the imposition of the minimum sentences as follows:

Where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed. A fine shall not substitute a term of imprisonment where a minimum sentence is provided.

68. The first count being a minimum sentence for sexual offence, it cannot run concurrently with the offence of robbery with violence. The court exercised its discretion and I am satisfied that there was no error of law. The sentence and the order to run consecutively is proper in the circumstances. The entire appeal therefore lacks merit and is accordingly dismissed.

Determination

69. I make the following final orders:

- a) This appeal on conviction and sentence in respect to both counts is dismissed save that the sentence shall commence on 21.05.2019, the date of arrest.
- b) For avoidance of doubt, there is no provision of a mandatory life sentence for robbery with violence. The statement is thus struck out from the sentence leaving 20 years imprisonment with the sentences of 10 years for rape and 20 years for robbery with violence running consecutively.
- c) Right of appeal 14 days.
- d) HCCRA No. E007 of 2025 is marked as dismissed.
- e) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 27th day of April, 2026. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Appellant present

Mr. Kihara for ODPP

Cpl. Nelson Omondi at Kisumu Maximum

Court Assistant - Martin/Michael