Sebaganga & another v Republic (Criminal Appeal E017 of 2023 & E021 of 2024 (Consolidated)) [2024] KECA 1297 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1297 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E017 OF 2023 & E021 OF 2024 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 27, 2024

BETWEEN

SAID CHEWA SEBAGANGA ..... 1ST APPELLANT

BRIAN KESI CHARO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (W. Korir, J.) delivered on 14th February 2019 in HCCRA No. 7 of 2012)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Malindi (W. Korir, J.) (as he then was) dated 14th February 2019 in Criminal Appeal No. 7 of 2012, and which was an appeal from the judgment, conviction and sentence imposed on the appellants by the Chief Magistrate's Court at Malindi (D. W. Nyamu, SRM) in Criminal Case No. 777 of 2010.

2. The appellants, Said Chewa Sebaganga and Brian Kesi Charo, were charged jointly with Mohamed Ali Bakari and Kibwana Ali Bakari in the Chief Magistrate's Court at Malindi in Criminal Case No. 777 of 2010 with the offence of robbery with violence and, in addition, the two accused were charged with gang rape.

3. The particulars of the offence were that, on 17th September 2010 at [Particulars Withheld] in Malindi District within the Coast Province, the appellants and the two co-accused, while armed with dangerous weapons, namely pangas, rungus and crude weapons, robbed PVF of a Panasonic camera, a laptop, five mobile phones, a binocular, Kshs. 500 in cash and two bags containing personal belongings, all valued at Kshs. 283,000; that they robbed Kahindi Daniel Safari of Kshs. 125 in cash; that they also robbed SBS (deceased) of two mobile phones make Nokia, a wrist watch and a wallet containing assorted items

of unknown value; and that, at or immediately before or after the robbery, they used actual violence on the victims aforesaid, eventually killing SBS.

4. In addition to the violent robbery aforesaid, and on the same day and place, the two appellants intentionally and unlawfully caused their penises to penetrate the vagina of PVF without her consent.

5. At the trial, the appellants and the co-accused persons pleaded not guilty to the offences as charged. The appellants were convicted and sentenced to suffer death for the offence of robbery with violence contrary to section 289(2) of the Penal Code. In addition, the two were convicted for the offence of gang rape contrary to section 10 of the Sexual Offences Act, 2006 but their sentence for this offence was held in abeyance in view of the death sentence imposed for the main offence of robbery with violence.

6. The prosecution case as testified by its witnesses was that, on 17th September 2010 at about 8:00pm, Changawa Karisa (PW4), a watchman at the Eco Camp, was on patrol around the compound when robbers came from behind and hit him on the head. PW4 ran away towards the ocean screaming. He met some people who came to his aid.

7. Around the same time, PVF (PW1), her husband, SBS (S – the deceased), Kahindi Mateso Safari (PW2) and Suleiman Ali Baba (PW3), were having dinner at the rooftop restaurant at the Eco Camp under candlelight and a kerosene lantern when PW1 spotted four men who she thought were guests entering the Bandas downstairs. Suddenly, the four men entered the restaurant armed with pangas and sticks and began harassing PW1 and her companions.

8. According to PW2 and PW3, the men had covered themselves with gunny bags (sacks). PW3 jumped over the balcony to the ground and fled while screaming for help. PW2 also tried to escape, but one of the men caught up with him, frisked him and took Kshs. 125 from his pocket.

9. The assailants repeatedly hit PW1 with the flat side of their pangas and demanded for money in Kiswahili. PW1 clung to her husband S, but the robbers managed to pull them apart. They pulled S downstairs where they cut him up and killed him. Three of the men, beginning with the 1st appellant, who she knew well having seen him in the village, followed by the 2nd appellant, who she also recognized, and a third man, proceeded to rape her in turns. The 1st appellant and the third man told PW1 to say that it was nice while they were raping her. The men left soon afterwards and went downstairs and joined the man who had caught PW2, and who was beating him demanding to know the room in which PW1 and her husband S slept. PW2 saw two of the men enter PW1's room and came out with two bags. Before they left, the man who was restraining PW2 hit him on the neck as a result of which he fainted. When he came to, PW2 heard PW1 screaming and calling out her husband's name and the names of PW2 and PW3.

10. PW1 put on her trousers and groped in the dark, and eventually met PW2 with whom they walked through the bush towards the village where a group of people came towards them. PW1 asked them to go to the Eco Camp to attend to S, who had been injured. PW1, PW2 and PW4 were taken to Malindi Police Station and, thereafter, to Malindi Hospital where PW1 learnt that S had passed away. PW1 later saw her husband's body, which had a big hole and cuts on the neck. Thereafter, PW1 returned to the Eco Camp and took stock of the stolen items.

11. Alfred Charo Yaa (PW5), a village elder at Mida, testified that, on the material night, he received a call and was informed that the Eco Camp had been attacked by robbers; that some people had been seriously injured; and that one had died. PW5 proceeded to the camp in the company of his two sons and found the deceased's body at the scene. Those injured had been taken to hospital. The police, who were at the scene, took the body and left.

12. On 19th September 2010, the 1st appellant went to PW5's home and told him that he had received a message informing him that he was wanted by the chief, and that he was surrendering to him. He asked PW5 whether he could assist him. PW5 sent a text message to the chief and called the assistant chief, who sent word to the police. The police went to PW5's house and arrested the 1st appellant. The following day, PW5 recorded a statement at the Malindi police station.

13. On 27th September 2010, Ibrahim Abdulahim (PW6), a clinician at Malindi Hospital, examined PW1, who had a history of rape and assault by 3 people two of whom she identified. Thereafter, PW6 completed a P3 form and noted that PW1 had tenderness and swelling on her head, neck and upper limb; and that there were bruises on the vaginal orifice. He carried out an HIV test, which was negative, as well as a urinalysis, which did not disclose anything significant. He concluded that PW1 was possibly raped; and that the superficial injuries which she suffered amounted to grievous harm in view of the psychological impact of the sexual assault.

14. The investigating officer, Corporal George Ogolla of CID Malindi (PW7), also testified, stating that he was detailed together with Sergeant Vincent Obae and PC Susan Morache to investigate the robbery and rape that had taken place at the camp; that, when they reached the scene, they received information that the two appellants were among the suspects; that one Kahindi was also a suspect, but that he was yet to be arrested; that they liaised with the chief and the elders to search for the suspects; that they visited the suspects' homes, but did not find them; that they recorded statements from the witnesses; that, on 18th September 2010, they arrested the 2nd appellant together with the two co-accused and recovered 2 binoculars from the 3rd accused's house, one of which belonged to PW1; that they also recovered 1 binoculars from the 4th accused; that one of the three pairs of binoculars allegedly belonged to PW1; and that they also recovered two bags, which contained PW1's personal effects, and a safe which belonged to the Eco Camp, and which had been left in the bush.

15. According to PW7, the 1st appellant was arrested by members of the public and handed over to the police. In addition to the forgoing, PW7 attended S's postmortem, which was conducted at Malindi Hospital on 22nd September 2010. He stated that the post mortem report had been misplaced at the hospital and had not been traced.

16. On 21st September 2010, the police organized an identification parade, which was conducted by CI Matthew Bett (PW8). PW1, PW2 and PW3 were summoned to the identification parade. PW8 stated that the two appellants agreed to appear in the parade and chose their position in the lineup. PW8 conducted four identification parades for each of the accused. According to PW1, each of the parades consisted of a lineup of nine people, who countersigned the parade forms on completion of the exercise. PW1 identified the 1st and 2nd appellants by touching them and, in addition, by voice recognition after those on the parade were asked to repeat the phrase "it is nice".

17. PW2 was only able to identify one person who was not among the accused persons. On his part, PW3 told the police that he recognized the voices of the "thugs," particularly the 1st appellant with whom he had lived in the same area for 3 years. PW8 stated further that PW3 identified the 1st appellant by touching. However, the 3rd and 4th accused persons were not identified by any of the witnesses at the parade.

18. Turning to further evidence of recognition, PW1 testified that she knew the appellants; that the 1st appellant was a cousin to S (her deceased husband); that the appellants had been working at the camp, but that they had differences with the proprietors as a result of which they were terminated; that the 1st appellant was jealous of S, who had been appointed as manager of the Eco Camp; and that the 1st

appellant tried to return to work, but that S asked him to leave. According to PW3, a dispute had arisen between the 1st appellant and S over the ownership and management of the camp.

19. The trial court having found that the appellants had a case to answer, placed them on their defence whereupon the appellants gave sworn evidence. The 1st appellant stated that, on 17th September 2010, he was at Malindi trying to secure the release of his wife from hospital after she had given birth; that he went home with her and did not leave the house until the next day as he was assisting his wife, who had undergone an operation; that, the next morning, he heard that the Eco Camp had been attacked by robbers; that he went to the scene, but did not find anyone there; that he proceeded to take tea with some villagers and left for work, and that it was then that he heard that some police officers had gone to his house to carry out a search while he was away; that, on 19th September 2010, the chief called him and informed him that the police wanted to see him; and that he went to the village elder who called the chief, soon after which he was arrested.

20. The 1st appellant stated further that he was the only person in the identification parade with dreadlocks; that no voice tests were done at the parade; that he joined the Eco Camp as a beneficiary; and that he had a disagreement with S and another man called Jackson about the shares and left after being compensated for the trees that he had planted. He denied killing S and raping PW1.

21. In his defence, the 2nd appellant stated that, on 17th September 2010, he was at Mida village; that, on returning home in the evening, he had dinner with his family and slept; that, the following morning, some passers-by told them that some robbers had attacked the Eco Camp; that he went to the scene in the company of his brother and found some villagers from whom he learnt that S had been killed; that, in the evening, the assistant chief, the village elders and four police officers came to his home and arrested him; that, inside the police vehicle, he found a woman called Kache Changwa Maitha; that the vehicle was driven to the station; that when he asked the police where he was being taken, he was slapped across the face; that he was taken into custody and an identification parade was conducted on 21st September 2010; and that PW1 and PW3 touched him. According to the 2nd appellant, everyone in the lineup spoke, but there was no recording device. He denied any involvement in the robbery or rape with which he was charged.

22. The 3rd accused stated that, when he was arrested, he explained that the binoculars in his possession were gifts given to him by tourists; that PW1 did not identify the binoculars as hers; and that he was not identified by the witnesses at the parade. He denied any involvement in the rape or robbery.

23. The 4th accused stated that, when he was arrested, he explained his possession of the binoculars recovered from his house; that the binoculars was given to him by a British tourist named Simon Gonzag; that PW1 did not state whether the binoculars were hers or not; and that the witnesses who appeared at the identification parade did not identify him.

24. In its judgment dated 14th January 2012, the trial court (D. W. Nyamu, SRM) was satisfied that the offences of robbery with violence and gang rape were disclosed by the evidence led by the prosecution. The court was satisfied that the prosecution had proved its case against the 1st and 2nd appellants beyond reasonable doubt, but found the explanation by the 3rd and 4th accused as to how they came into possession of the binoculars recovered from them satisfactory. Accordingly, the trial court convicted the 1st and 2nd appellants as charged, but acquitted the 3rd and 4th accused.

25. When the appellants appeared for sentencing on 17th January 2012, the trial court heard and considered their mitigation and sentenced them to suffer death for the offence of robbery with violence. Their sentences in respect of the charge of gang rape were held in abeyance in light of the death sentence imposed on them.

26. Aggrieved by the conviction and sentence, the appellants filed separate but similar appeals. The grounds on which their appeals were anchored were that the learned trial Magistrate erred in law and in fact: in relying on a fatally defective charge sheet to convict and sentence them; by not appreciating that the first report read in court did not contain their names or descriptions; in not considering that the identification by the witnesses was weak because the incident took place at night, the lighting conditions of the scene were not disclosed, and while the crime was committed in a terrifying manner; in failing to see that the identification parade was not conducted professionally and in accordance with the law; for reaching the decision despite the fact that some witnesses were not called to testify; by asserting a version of facts not testified to during the trial; and by disregarding the appellants' defenses of alibi.

27. In its judgment dated 14th February 2019, the High Court (W. Korir, J.) (as he then was) found that the appellants' appeal on conviction had no merit and dismissed it. With regard to their appeals on sentence, the learned Judge reviewed the death sentence imposed by the trial court in view of the Supreme Court's decision in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR. Accordingly, the learned Judge considered the mitigating and aggravating circumstances and set aside the death sentences in respect of the charges of robbery with violence and substituted therefor a sentence for life imprisonment for each of the three counts of robbery with violence. In reaching its decision, the court took to mind the fact that the appropriate sentence for the offence of gang rape was life imprisonment, but held it in abeyance. Save for the reduction of sentence from death to life imprisonment, the court dismissed the appellants' appeal.

28. Aggrieved by the judgment of W. Korir, J., the appellants moved to this Court on appeal on the grounds that the learned Judge erred: by failing to consider that the charge of robbery with violence was not proved beyond reasonable doubt; that there was no positive identification at the scene of crime; that the appellants' arrest had no link with the present matter; that the prosecution failed to prove its case beyond reasonable doubt; and that the appellants' defence was not challenged.

29. In addition to the grounds aforesaid, the 1st appellant filed undated supplementary grounds of appeal stating that the learned Judge erred in law: by not considering that the prosecution never placed him at the scene of crime; not considering that the prosecution never produced some crucial evidence at the trial; not considering the weight of the evidence against the conviction and sentence; not considering that the identification was not conducted in accordance with the law as stipulated in Chapter 46 of the Force Standing Orders; and in failing to consider that the charge under Penal Code denied the court the powers to exercise discretion in sentencing based on the mitigating circumstances in contravention of Articles 26(1), 25(c) and 50(2) of the Constitution, and sections 216 and 329 of the Criminal Procedure Code.

30. Likewise, the 2nd appellant filed undated supplementary grounds of appeal stating that the learned Judge erred in law: by failing to find that the identification evidence was not sufficient to warrant his conviction; by failing to find that voice identification parade was irregular for the use of the same members of each parade, and in violation of Chapter 46 of the Force Standing Orders requiring that members of the parade should change at every turn; by failing to find that the doctrine of recent possession was not applicable in the circumstances; by finding that the prosecution had proved the offences against him; by substituting the mandatory death sentence for imprisonment for life without proper finding that it does not meet the constitutional threshold, particularly Articles 27 and 28 of the Constitution; and by failing to consider the time he had spent in remand custody prior to conviction and sentence.

31. We hasten to observe that most of the grounds advanced by the appellants on appeal to this Court relate purely to matters of factual evidence, which we cannot re-open for reconsideration or pronounce ourselves thereon on second appeal.

32. In support of the appeal, learned counsel for the appellants, M/s. Ngumbau Mutua and Associates, filed written submissions and a list of authorities dated 19th April 2024 citing 6 judicial authorities, namely: Mbelle vs. Republic [1984] KLR 686; Vura Mwachi Rumbi vs. Republic [2016] eKLR; and Karani vs. Republic [1985] KLR 290, for the proposition that, when dealing with voice evidence, the trial court should ensure that the voice was that of the accused; that the witness was familiar with the voice and recognized it; and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.

33. Citing the case of Peter Kifue Kiilu & another vs. Republic [2005] eKLR, counsel highlighted the principle that a fact may be proved by the testimony of a single witness, but that this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult; Kariuki Njiru & 7 others vs. Republic [2001] eKLR for the proposition that evidence relating to identification must be scrutinised carefully, and that it should only be accepted and relied upon if the Court is satisfied that the identification is positive and free from the possibility of error; that the surrounding circumstances must be considered; and that among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity.

34. Finally, counsel drew the Court's attention to the case of Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996 (UR), submitting that it is for the prosecution to elicit evidence as to whether the witness had observed the features of the culprit and, if so, the conspicuous details regarding his features given to anyone, particularly to the police at the first opportunity; and that both the investigating officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence.

35. Opposing the appeal, Ms. Wangari Mwaura, Principal Prosecution Counsel, filed written submissions dated 23rd April 2024. She cited the cases of Ganzi & 2 others vs. Republic [2005] 1 KLR 52 setting out the elements of the offence of robbery with violence being that the offender is armed with any dangerous or offensive weapon or instruments; or that the offender is in the company of one or more other persons; or at/or immediately before or immediately after the time of such robbery, the offender wounds, beats, strikes, or uses other personal violence on any other person; Mbelle vs. Republic (supra) that set out the three-fold considerations that the court must make when dealing with evidence of identification by voice; and Wamunga vs. Republic (1989) KLR 424 at 426 where the court observed that where the only evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

36. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the Criminal Procedure Code. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

37. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on 5 main issues of law or of mixed law and fact, namely:

(i) whether the appellants were properly identified so as to support a conviction;

(ii) whether the offence of robbery with violence was proved against the appellants on the required standard to sustain a conviction;

(iii) whether the sexual offence of rape was proved to the required standard;

(iv) whether the appellant's alibi defence rebutted the prosecution's case; and

(v) whether the sentence meted on the appellants and reduced on 1st appeal to the High Court should be interfered with.

38. On the 1st issue as to whether the appellants were positively identified so as to support a conviction, counsel for the appellants submitted that the trial court and the first appellate court were at fault in concluding that the evidence of recognition adduced by PW1 was sufficient to support a conviction; that the two courts below failed to apply the 3-point subjective test outlined in Mbelle vs. Republic (supra); that the two courts should have exercised great care and caution to ensure that PW1 was familiar with the appellants' voices, that she recognized those voices, and that the conditions obtaining at the time the recognition was made were such that there was no mistake made; that none of the courts below were sensitive to the need to adequately satisfy themselves on the recognition evidence; that there was no evidence that, in her initial report, PW1 gave the names and descriptions of the alleged attackers, and that their names were only disclosed by PW1 and other witnesses when testifying at the trial; and that the basis of the appellant's convictions was voice recognition by a single identifying witness.

39. According to learned counsel, voice recognition is the weakest kind of evidence to sustain a conviction. Counsel submitted that the prevailing circumstances at the scene did not favour positive and proper voice recognition; that, where the only evidence against an appellant is that of voice recognition, the trial court is required to examine such evidence with care and circumspection; and that it must be satisfied that the prevailing circumstances were favourable and free from possibility of error before such evidence can be a basis of a conviction. According to counsel, failure of the courts below to do so goes to the root of the conviction.

40. In her submissions, the Principal Prosecution Counsel submitted that PW1 identified the appellants and testified that they were persons previously known to her; that, when gang-raping her, they asked her to tell them that "it was very nice;" and that, during the identification parade, the people lined up were asked to repeat the same words, and that PW1 was able to recognize the appellants' voices as among those who assaulted them and gang-raped her; that the evidence of the 2nd appellant corroborates that of PW1 and PW7 that the appellants were identified through voice recognition; and that, therefore, the appellants were properly identified.

41. Having considered the evidence of recognition as presented to the trial court, the learned Judge found that the prevailing conditions of the scene as painted by the witnesses may not have been suitable for visual recognition; but that, at the identification parade, PW1 recognized the voices of the appellants, who were known to her prior to the incident. As the learned Judge observed:

> " 36. As pointed out the lighting was insufficient. However, three of the assailants remained with PW1 taking turns to rape her for a period of about 10-15 minutes and were therefore in close proximity. She could smell and hear

them. Additionally, each of the said three made her state that their action was enjoyable. The words being "say it is nice and you like it." She immediately recognised the voice of the 1st Appellant. She knew him as S's cousin. Her testimony was that she was involved with the [particulars withheld] project from the beginning and she knew the 1st Appellant who used to work there ....

44. PW1 knew the 1st Appellant, was familiar with his voice and recognised it. Further, the 1st Appellant compelled her to make certain utterances as he raped her, making the conditions obtaining to eliminate an error as to who said what...

47. However, I am not convinced that PW3 positively identified the 1st Appellant for reasons that he saw two masked men and ran off. He did not state how he identified the 1st Appellant ....

49. During the identification parade where the 2nd Appellant was involved, PW1 requested PW8 to have the parade members to utter some words .... It was after uttering the words that PW1 touched the 2nd Appellant pointing him out as a suspect. As pointed out the assailants were at close proximity while they took turns to rape PW1 and each made her say some particular words. Furthermore PW1 had indicated that the 2nd Appellant was also a friend or at least she thought he was one. She also stated that he worked at [particulars withheld] at one time. This gave an impression of some familiarity. These facts convince me that even though the words were not recorded PW1 was able to positively identify the 2nd Appellant."

42. In Mbelle vs. Republic [1984] KLR 626, this Court set out the conditions that must be satisfied when considering evidence of voice recognition as follows:

> "In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognized it, and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it."

43. Addressing itself to the evidence of recognition in the case of Reuben Taabu Anjononi & 2 Others vs. Republic [1980] eKLR, this Court held that:

> "... 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."

44. To our mind, the fact that such recognition is based on the testimony of a single witness does not of itself diminish its weight or credibility. However, the trial court is enjoined to exercise caution when considering recognition evidence of a single witness to eliminate the possibility of error, and to ensure that favourable circumstances existed to justify the admission of such evidence (see Wamunga vs. Republic (1989) KLR 424 at 426).

45. In Abdala bin Wendo & Another vs. Republic (1953) 20 EACA 166, it was held that:

> "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the

greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

46. PW1 identified the appellants through voice recognition. Due to her close proximity with each of them for 10-15 minutes during which time the appellants spoke to her; and furthermore, having hitherto interacted extensively with the 1st appellant (who was her deceased husband's cousin) and the 2nd appellant, both of whom previously worked at the Eco Camp, we are satisfied that her evidence was reliable and sufficient to identify the appellants, as the assailants on the material night.

47. On the question as to whether the identification parade should have been comprised of different sets of people in each instance, this Court had this to say in Boniface Wahome Maina & another vs. Republic [2010] eKLR:

> " No authority was however cited to show that where there are several identifying witnesses at the identification parade members must be different for each identifying witnesses. That would not be logical unless contrary to the Police Force Standing Orders or in the conduct of the identification parades the witnesses are allowed to communicate with each other in the course of the parade. If the Force Standing Orders are followed it would not matter that the members of the parade are not changed because to each witness, the parade members are strangers to the witnesses. The only requirement as stated in Force Standing Order No. 6 (IV) (e) is that:-
>
> 'the accused/suspected person shall be allowed to take any position he chooses and will be allowed to change his position after each identifying witnesses has left, if he so desires.'"

48. On the authority of Boniface Wahome Maina & another vs. Republic (ibid), we reach the conclusion that the 2nd appellant's submission that the identification parade was irregular by reason of the fact that the same persons were used in each parade, or that the process was in violation of the Force Standing Orders does not hold.

49. In addition to the foregoing, we find nothing on record to suggest that the identification parades in issue were conducted in breach of the Force Standing Orders as alleged by the appellants.

50. Even though the learned Judge concluded that PW3 did not state how he identified the 1st appellant, we take to mind PW3's testimony to the effect that when the "thugs" entered the restaurant, he heard them saying, "Lie down properly."; and that he recognised the 1st appellant's voice as they had lived in the same area for 3 years. His familiarity with the 1st appellant lends further credence to his ability to identify him. In view of the foregoing, we reach the inescapable conclusion that the appellants were recognised and positively identified by the prosecution witnesses, and that the learned Judge was not at fault in upholding the trial court's finding in this regard.

51. Turning to the 2nd issue as to whether the offence of robbery with violence was proved to the required standard, we hasten to observe that the learned Judge was by no means at fault in upholding the trial court's findings on evidence that a robbery took place on the particular day, time and place as established by the prosecution; and that the appellants and two other persons used violence before and after the robbery. We find nothing to suggest that the ingredients of the offence of robbery were not proved. We take to mind the provisions of section 296(2) of the Penal Code, which sets out the elements

of robbery. To qualify as robbery with violence, the number of assailants, whether the appellant was armed with a dangerous weapon, and whether the appellant beat the complainant has to be determined as was the case here. Section 296(2) of the Penal Code reads:

296.

(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.

52. Pronouncing itself on the ingredients of robbery with violence, this Court at Mombasa had this to say in Johana Ndungu vs. Republic [1996] eKLR:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section 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) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> If he 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 violence to any person."

53. Pronouncing itself on the statutory ingredients of the offence of robbery with violence in Oluoch vs. Republic [1985] KLR 549, this Court held:

> " Robbery with violence is committed in any of the following circumstances: a) The offender is armed with any dangerous and offensive weapon or instrument; or b) The offender is in company with one or more person or persons; or
>
> c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ...."

54. This being an issue of factual evidence on which points of law may arise, we need not say more. Moreover, it is not within our remit to re-open it for reconsideration, save to satisfy ourselves that the learned Judge was correct in upholding the trial court's finding on the integrity of the administrative procedure applied in the identification of the persons responsible therefore, and that the statutory ingredients of the offence were established.

55. We reach this conclusion taking to mind this Court's decision in Dima Denge Dima & Others v Republic [2013] KECA 480 (KLR) where the Court held:

> " The elements of the offence under Section 296

(2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction."

56. In view of the foregoing, and on our consideration of the two points of mixed law and fact, we find no fault with the learned Judge's conclusion in that regard.

57. On the 3rd issue as to whether the sexual offence of rape was proved to the required standard, the appellants contended that it was not; that the evidence was not sufficiently cogent; and that none of the appellants were subjected to any medical examination in order to connect them with that offence.

58. In response, the respondent's submission was that the medical evidence on record confirmed that, at the time of the attack, the appellants sexually abused and assaulted PW1.

59. Addressing himself to this issue, the learned Judge observed:

> "28. .... It was the testimony of PW1 that she was then raped by three of the men. PW6 on examination of PW1 found injuries to her vaginal orifice and concluded that there was a possibility that rape occurred. The medical officer also found that there was grievous harm due to the psychological effects of rape. The appellants have challenged the finding by PW6 indicating that his opinion on the rape was not conclusive.
>
> 29. The evidence of those present at the scene of crime is that the gang of armed intruders separated the men from the only woman present in that place. They assaulted the woman by hitting her on the head with their weapons and remained with her for some time. PW1 indicated that it was for a period of about 10 - 15 minutes. PW2 noted that some time later after he was taken downstairs, beaten and frisked he heard the footsteps of three people coming downstairs. These facts coupled with the medical evidence leads to the conclusion that gang rape did occur. Indeed the evidence of PW1 was clear on what was done to her. There is no reason to doubt her testimony. On top of the corroboration already alluded to, the proviso to Section 124 of the Evidence Act would come into play."

60. The appellants appear to suggest that the gang rape inflicted on PW1 could only find proof by medical evidence conducted on them. To our mind, that is neither the law nor the reality of life. It is the medical report on the examination of the victim of rape that counts to establish whether she was raped as claimed. As for the accused, nothing would turn on a medical examination on them several days after the fact. That said, it is instructive that the proviso to section 124 of the Evidence Act only contemplates production of the victim's evidence of the sexual offence complained of to sustain a conviction.

61. Section 124 of the Evidence Act (Cap. 80) provides:

> 124. Corroboration required in criminal cases.
>
> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

62. The trial court was satisfied with the evidence of PW1 as to her identification of the appellants as two of the three men who raped her, as further corroborated by the medical evidence tendered by PW6. The learned Judge came to the same conclusion on re- evaluation of the evidence. Having considered the record as put to us, the rival submissions and the law, we find no fault in the learned Judge's finding that the appellants' conviction for the offence of rape was founded on cogent evidence of penetration without PW1's consent (see Nicholas Kiprotich Rono vs. Republic [2022] eKLR where the High Court (A. N. Ongeri, J.) correctly pronounced itself on the ingredients of rape, to wit, penetration and lack of consent to the sexual act complained of).

63. The statutory definition of rape in section 3(1) of the Sexual Offences Act reads:

(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.

64. The main ingredients of the offence of rape as prescribed in section 3(1) of the Sexual Offences Act include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of the victim's consent. In the case of Republic vs. Oyier [1985] KLR 353, the Court of Appeal held that:

> " 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."

65. Having considered the record, the rival submissions and the law, we find nothing to suggest that the learned Judge was at fault in upholding the trial court's decision to convict the appellants for the offence of rape.

66. In view of the foregoing, we are satisfied that the statutory ingredients of the two offences of robbery with violence and rape were established. Accordingly, the appellants' contention that the two court's below failed to find that the prosecution did not prove its case against the appellants beyond reasonable doubt does not hold. And that settles the 2nd and 3rd issues before us.

67. Turning to the 4th issue as to whether the appellants' defence of alibi successfully rebutted or cast doubt on the prosecution case, the 1st appellant's alibi (Latin meaning "elsewhere") was that he was at Malindi on 17th September 2010 where he was trying to secure the release of his wife from hospital after she had given birth; that he went home with her and did not leave his house until the next day when he heard that the Eco Camp had been attacked by robbers; that, when he went to the scene, he found no-one there; and that he joined some villagers for tea and thereafter proceeded to work.

68. The 2nd appellant's alibi was that, on 17th September 2010, he was at Mida village; that, on returning home in the evening, he had dinner with his family and went to sleep; that he learnt of the attack on the Eco Camp the following morning; that he went to the scene accompanied by his brother and found some villagers; and that he returned home only to be arrested that evening.

69. Upholding the trial Magistrate's decision to reject the appellants' alibis, the learned Judge had this to say:

> "52. ... the prosecution witness positively identified the appellants and the appellants were picked out at the identification parades hence their defence did not cause the prosecution's watertight case to leak. It is also noted that at no time during the hearing of the prosecution case did the appellants raise the issue of the defence of alibi. The prosecution was not therefore given an opportunity by way of cross-examination to rebut the defence of alibi. The trial magistrate was therefore correct in rejecting the appellants' defence."

70. We take to mind the fact that the appellants' alibi, which is a question of both law and fact, came too late in the day, to wit, at the hearing of their defence, which denied the prosecution the opportunity to inquire into and test their alibi at the earliest opportunity in the proceedings. In any event, the appellants' alibi was not corroborated by any witnesses despite their claim that they had spent the material day in the company of other people, none of whom testified in their defence. In effect, their alibi did not displace the prosecution evidence as to their recognition by the victims of the robbery and gang rape, which were proved beyond reasonable doubt.

71. This Court set out the principles that guide the trial Court when considering an alibi defence in Erick Otieno Meda vs. Republic [2019] eKLR in the following words:

> "(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. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

72. In the same vein, in R. vs. Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145, the predecessor to this Court held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and, if they are satisfied as to its genuineness, proceedings will be stopped." [Emphasis added]

73. Having found that the learned Judge had correctly affirmed the trial court's finding that the prosecution had proved its case beyond reasonable doubt, and that the appellants' defence of alibi could not stand, we find nothing to fault the learned Judge for upholding the appellants' conviction. Neither do we find anything on record to suggest, as submitted by counsel for the appellants, that the learned Judge failed to consider any evidence adduced by the prosecution or by the defence in reaching the court's decision. Moreover, There is no set format for re-evaluation of evidence (see Ndwiga & 2 others vs. Republic [2017] KECA 443 (KLR; Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634; and Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR) where ODOKI JSC (as he then was) had this to say: "While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance").

74. In conclusion, we are satisfied that the learned Judge re- evaluated and considered all the evidence, the grounds of appeal and the rival submissions on points of both law and fact. Notwithstanding our conclusion in this regard, it would be remiss of us not to comment on the 5th and final issue as to whether the sentence meted on the appellants should be disturbed notwithstanding the fact that severity of sentence is essentially a matter of fact which, except in certain circumstances, lies outside the scope of our mandate on second appeal as delimited by section 361(1) (a) of the Criminal MGK v Republic [2020] eKLR; and Procedure Code (see Reuben Karari C/O Karanja vs. Republic (1956) 17 EACA 146) .

75. Though raised as a ground of appeal, learned counsel for the appellants did not make any submissions on the issue relating to the severity of the sentence meted on the appellants and reduced on first appeal.

76. On their part, counsel for the respondent submitted that the level of violence unleashed on the complainants (PW1) was unfathomable and warranted a long term of imprisonment; that the violence led to the death of S Sebaganga and the harm inflicted on the other victims, including the gang rape of PW1; that the High Court reduced the appellants sentence from death to life imprisonment; and that there is no reason to interfere with the reduced sentence meted upon the appellants by the High Court.

77. In substituting the death sentence meted out by the trial court for life imprisonment, the learned Judge stated that:

> " 56. This court ought to consider both the mitigating and aggravating factors. The mitigating factors are as follows: the age of the appellants, time spent in custody including remand time, lack of previous criminal records, remorsefulness and whether or not there is reformation. The 1st Appellant during trial stated that he never committed the offences, is the first-born taking care of the family, he and his wife are HIV+ and he prayed for leniency and he has a child who is bound to suffer if the sentence is harsh. The 2nd Appellant

informed the court that he is a good citizen, he was innocent and was framed as [particulars withheld] was being mismanaged and that he was a victim of circumstances.

57. The aggravating facts are the total value of the items stolen, the type of injuries sustained and the gang rape of PW1. It is also noted that a person lost his life during the robbery ....

59. ...Although the appellants were first offenders their actions cannot be looked at with an eye of mercy. In my view, they should be locked away from society forever. I therefore set aside the sentence of death in respect of the charges of robbery with violence and substitute therewith a sentence of life imprisonment for each of the three counts."

78. Having considered the record and the learned Judge's reasoning in reaching the first appellant court's decision on sentence, we find no reason to depart from or interfere with his decision in that regard. We agree with the first appellate court's consideration of the mitigating and aggravating factors, the gravity of the offences charged, and the consequences thereof. The sentence was neither illegal nor unlawful. Neither did the superior court consider or fail to consider any material facts in reaching its decision, or otherwise misdirect itself in reducing the statutory sentence meted on the appellants by the trial court. In any event, it is not arguable that the reduced sentence is manifestly excessive, or that it is otherwise liable to interference by this Court (see MGK v Republic [2020] eKLR).

79. We form this view cognizant of this Court's decision in Joseph Muerithi Kanyita vs. Republic [2017] eKLR where the Court stated:

> " In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant." [Emphasis ours]

80. With those factors in mind, we find no reason to disturb the sentence meted on the appellants and as reduced on appeal to the High Court. Accordingly, the 1st and 2nd appellants' appeals fail and are hereby dismissed and, consequently, the Judgment of the High Court of Kenya at Malindi (W. Korir, J.) (as he then was) delivered on 14th February 2019 is hereby upheld, and those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR