REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HCCRA NO.174 OF 2012

ERIC MAGWARO ONTUMBO……..APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

J U D G M E N T

The appellants herein Erick Magwaro, Andrew Gerare and Wycliffe Nyamweya were the 1st, 2nd and 3rd accused in the Senior Resident Magistrate's Court at Keroka Criminal Case No. 1361 of 2011. In Count 1 they were charged with **Robbery Contrary to Section 296 (2) of the Penal Code** the particulars of the charge were that on the night of 21st and 22nd November 2011 in Borabu District Nyamira County while armed with an axe, simi and panga they robbed G G O assorted women and children clothings, suit cases, utensils, blankets, motorolla mobile phone W20, 2KG dry maize, 10 kilos of dry beans, cash Kshs.10,000 and immediately before or immediately after the time of such robbery used actual violence to the said G G O.

They also faced the offence of handling stolen property **Contrary to Section 322(1) of the Penal Code.** The particulars of the charge are that on the night of 21st and 22nd November, 2011 in Borabu District of Nyamira County jointly otherwise than in the course of stealing dishonestly handled one black red stripped suitcase, one thermos …flask, assorted utensils, a blanket, hot pots, one motorolla mobile phone, 10 kilos of maize, 10 kilos of beans all valued at Kshs.20,000 the property of GGO knowing or having reasons to believe them to have been stolen or unlawfully obtained.

In **Count II** the 1st accused was facing a charge of gang rape **Contrary to Section 10 of the Sexual offences Act No.3 of 2006.** The particulars of the charge were that on the night of 1st and 2nd November, 2011 in Borabu District, Nyamira County in association with others before Court unlawfully caused his penis to penetrate the vagina of G G without her consent.

The 2nd accused was also facing the offence of **Gang Rape Contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge are that on the nights of 21st and 22nd November, 2011 in Borabu District of Nyamira County in association with others not before Court, intentionally caused his penis to penetrate the vagina of GG without her consent.

The 3rd accused also faced the offence of **Gang Rape Contrary to Section 10 of the Sexual offences**

Act No.3 of 2006. The particulars of the charge are that on the nights of 21st and 22nd November, 2011 in Borabu District of Nyamira County in association with others not before Court intentionally caused his penis to penetrate the vagina of GG without her consent.

In **Count III** they jointly faced the charge of robbery with violence **Contrary to Section 296 (2) as read with Section 295** of the **Penal Code Cap 63 Laws of Kenya.** The particulars of charge were that on the night of 21st and 22nd November 2011 in Borabu District within Nyamira County while armed with an axe simi and a panga, robbed L M S of her leso valued at Kshs.100 and immediately before or immediately after the time of such robbery used actual violence to the said L M S.

They also faced an alternative charge of handling stolen property **Contrary to Section 322 (1) (2) of the penal Code Cap 63 Laws of Kenya.** The particulars of the charge were that on the night of 21st and 22nd November, 2011 along Kijauri/Keroka main former road in Borabu District within Nyamira County jointly. Otherwise than in the cause of stealing dishonestly handled one leso valued at Kshs.100 the property of L MS knowing or having reasons to believe them to have been stolen or unlawfully obtained.

In **Count IV** they faced a charge of robbery with violence **Contrary to Section 296 (2) as read with Section 295 of the Penal Code Cap 63 Laws of Kenya.** The particulars of the charge were that on the night of 21st and 22nd November, 2011 in Borabu District within Nyamira County while armed with an axe, simi and a panga robbed DBM of his Kshs.130/= and one pair of black shoes all valued at Kshs.3130/= and immediately before or immediately after the time of such robbery used actual violence to the said DBM

They also faced an alternative charge of handling stolen property **Contrary to Section 322 (1) of the Penal Code Cap 63 Laws of Kenya**. The particulars of the charge were that on the night of 21st and 22nd November, 2011 along Kijauri/Keroka main former road in Borabu District within Nyamira County jointly otherwise than in the course of stealing dishonestly handed one black pair of shoes valued at Kshs.3000/= the property of DBM knowing or having reasons to believe them to have been stolen or unlawfully obtained.

In **Count V** they faced another robbery with violence charge **Contrary to Section 296 (2) as read with Section 295 of the Penal Code Cap 63 laws of Kenya.** The particulars of the charge were that on the night of 21st and 22nd November, 2011 in Borabu District within Nyamira County while armed with an axe, simi and a panga robbed BO of his shirts valued at Kshs.600 and immediately before or immediately after the time of such robbery used actual violence to the said B OO.

They also faced an alternative charge of handling stolen property **Contrary to Section 322 (1) (2) of the penal Code Cap 63 Laws of Kenya.** The particulars of the charge were that on the night of 21st and 22nd November 2011 along Kijauri/Keroka main former road in Borabu District within Nyamira County jointly otherwise than in the cause of stealing dishonestly handled two shirts valued at Kshs.600 the property of BOO knowing or having reasons to believe them to have been stolen unlawfully obtained.

They all pleaded not guilty to the above charges and trial ensued.

P.W.1 was GG one of the complainants in the above charges. She told the Court that on the night of 21st and 22nd November, 2011 at around 1.30p.m. she was in her house sleeping with her children and mother-in-law. She also recalled that she had locked the house from inside as usual and that the lantern lamp was still on. Soon after she heard the door being broken and some people entered her house. The people who had broken into her house proceeded to wake her up and asked her for money. She noticed that the people who broke into her house were three in number as her lantern lamp was still on.

She woke and gave them kshs.10,000 which she had in her house. She also noted that the robbers were not masked Furthermore, that the 1st accused wore a red jacket and a black trouser, 2nd accused wore a black jacket and 3rd accused wore a black jacket . In addition to this that the 1st accused was armed with a Somali sword, and 2nd accused had an axe and 3rd accused had a panga.

That 1st accused then took her to another room and started raping her infront of her children. Meanwhile her mother in law was taken to the sitting room area. The 1st accused then raped her for 2 hours, Immediately, the 2nd accused took her to the corridor and raped for another hour the 3rd accused also took her outside and raped her for another one hour. She also confirmed that she was able to see the accused persons clearly as the lamp was on throughout the ordeal and happenings. The accused persons were also talking amongst themselves telling her that they wanted to cut her head.

She also confirmed that during the ordeal her mother-in-law stayed in the sitting room and neither her mother-in-law or her children were raped nor defiled. She confirmed that amongst the things stolen by the accused persons were kitchen utensils, maize 20Kgs and beans 15kgs. That the utensils included hot pot, glasses, plates and crops. In addition to this, that accused persons also stole blankets, milking jelly and assorted clothes.

Furthermore, she identified the axe that the 1st accused used to arm himself as (MFI-1) the Somali sword used by the 2nd accused to arm himself as MFI -2 and the panga the 3rd accused had used to arm himself as (MFI-3). She also identified the gumboots the 2nd accused wore as MFI-4, jacket that the 1st accused wore (black) MFI-5, the jacket that 2nd accused wore (red) as (MFI-6) jacket the 3rd accused wore blue as MFI-7. She also identified the hot pots that were stolen by the accused as MFI-8, the plates all (17) of them as MFI-9, sauces (4) of them as MFI-10, glasses 9 of them as MFI-11, 17 cups as MFI-12, a briefcase MFI-13, beans MFI-14, maize (5 tins) –MFI-15 and 2kg maize tins as MFI-16. Moreover she identified a bucket MFI-18, blanket MFI-19, leso MFI-20, spoons 7 of them as MFI-21, padlock MFI 22, belt MFI 23, phone motorolla MFI-24 and stated that all those things belonged to her and had been stolen by accused persons.

She also stated that after the 3rd accused had raped her he returned her to the house before he (3rd accused) proceeded to the sitting room and proceeded to eat the left over's they had eaten at supper time after which they started to arrange and then left with the properties she had identified above. She also stated that the accused persons had stayed in her house for over four hours (4 hours).

After the accused persons left her house, they started screaming and in turn their neighbours responded to their screams. The police were also alerted and they also arrived. She was then taken to Keroka District Hospital on the same night, was treated and discharged the following day.

Meanwhile, the accused persons were also arrested in the same night while she was in hospital, they were brought to hospital with all the items they had stolen from her and she was able to positively identify her stolen items and the accused persons. She also identified her P3 form as MFI-25 and treatment notes as MFI-26. She also confirmed that at the police station an identification parade was conducted by the police and he was able to identify the 3 accused persons. She also produced the identification parade records as MFI-27, 28 and 29 respectively. Lastly she confirmed that all the stolen properties were recovered from the 3 accused persons whom she identified before Court.

P.W.2 was LM a niece to P.W.1. She confirmed that she lives with P.W.1 and recalled that on the night of 21st/22nd November, 2011 the 2nd accused person got hold of her and hold of her and wanted to rape her. She in turn told him that she was H.I.V Positive, the 2nd accused feared for his life and let her free. He then made her sit down. She corroborated P.W.1 testimony that the accused persons raped P.W.1.

She stated further by explaining that the rooms in P.W.1's house were adjacent to each other and therefore she would clearly see the accused persons raping P.W.1. She also corroborated P.W.1's evidence that the accused persons told her that they were hungry they ate some left over, and that accused persons remained in P.W.1's house for more than 4 hours and she saw them clearly as the lantern lamp was on. She also confirmed that they (accused) stole many items which she saw in Court. She also confirmed that the assorted clothes (shuka) leso were hers.

Furthermore, she also corroborated P.W.1's evidence by stating that the 2nd accused had an axe, 2nd accused wore a red jacket 1st accused wore a black jacket while 3rd accused had a blue jacket.

She also stated that once accused were through they left and instructed them not to make any noise. On accused persons leaving their home, they screamed and neighbours responded to the alarm. She identified the 3 accused persons as the people who had robbed them and raped P.W.1.

Furthermore, she attended an identification parade whereby she identified all the 3 accused persons in a parade.

P.W.3 was DBM P.W.1.'s nephew. He recalled that on the night of 21/11/2011 he was going home from a bar at around 10p.m. He explained that his house is next to P.W.1's house hence they used the same road. As he proceeded to his house, he came across 3 people who had torches and inquired from him where he going. They then proceeded to ask him how much he had in his pocket and he told them Kshs.30. On searching him, 2nd accused abused him as he (2nd accused) removed a small axe from his jacket. He (2nd accused) took his belt and used it to tie his hands. He then proceeded to remove his shoes and then he (2nd accused) tied his hands. The (2nd accused) then proceeded to remove his shoes and then he (2nd accused) tied his legs. Apparently the 2nd accused got Kshs.130 from his pockets.

He then stayed where he had been tied and after a while he heard P.W.1 screaming. He managed to untie himself and rushed to P.W.1's house and found her crying. Their neighbours in turn responded to the screams, as well as administration police officers. On arrival of police officers, they proceeded with their patrol and after a few hours a neighbour informed them that the thugs had been arrested by the police. He was then called to identify the shoes after the accused were arrested. He however clarified that he saw the accused at the police station and identified his shoes. He also stated that 2nd accused had a red jacket though he did not attend the identification parade.

P.W.4 was B O a minor aged 12 years old. The trial Court conducted a voire dire examination on him after which it formed the opinion that the minor had sufficient intelligence to understand the meaning of an oath. The minor proceeded to be sworn and gave evidence under oath. P.W.4 stated that he was P.W.1's son thus he was P.W.2 and P.W.3 cousin. He also stated that he knew 2nd accused physically as he used to stay at Omanga working there. That on 21st November, 2011, he was at home sleeping when he heard the door to their house being broken and opened. He corroborated the evidence of P.W.4 and P.W.II. He also identified (MF.I.-17) as the two shirts which belonged to him and were stolen by accused persons. He also stated that all the items i.e M.F.I.-MF.I. -30 were stolen from their house that he recorded his statement at the police station and he attended a police identification parade and identified the 3 accused persons. Lastly, he reiterated that he knew the 2nd accused very well.

P.W.5 was Dr. Joel Oyaro a clinical officer attached to Kijauri Level 4 hospital. He confirmed to the court that on the 23/11/2011 he examined P.W.1 who had alleged to have been gang raped by 3 people. By the time P.W.1 came to hospital, she was walking with difficulty. On examining P.W.1 she had some tenderness on her chest and thighs. He estimated the age of her injuries approximately 2 days, he also observed that a blunt object was the probable weapon. He treated her with anallegies and put her on

H.I.V. tablets and medication. He classified P.W.1's injuries as harm. In addition to this he also examined P.W.1's vagina and noted bruises to the labia and broken hymen, swelling to the cervix, bruises in the vagina wall and a whitish vagina discharge. He thus concluded that there was penetration. He produced P.W.1's treatment book from Keroka District Hospital as Exhibit 26, P.W.1's P3 form as P. Exhibit 25 and laboratory form as P. Exhibit No. 31.

P.W.6 was No.55669 CPL. Joseph Chirchir attached to Manga Police Office. He recalled that on 22/11/2011 he was on duty when C.I. Ndati called him and told him that there had been a robbery at Amakara. He proceeded to the scene accompanied by P.C. Lagat Hassan and O.C.S. Ndati. On arrival at the scene they met members of the public who were helping P.W.1 and her family. They took P.W.1 to Masaba Keroka Hospital and then proceeded to her house (P.W.1) only to find that P.W.1's house had been ransacked all over. He also noticed that the main entrance door had been broken into and they had been attacked by 3 assailants.

They then started to follow the assailants and upon reaching Kijauri they saw 3 people standing on the road with big luggages. They then intercepted the 3 suspects and interrogated them, On searching their luggages they got suspicious on finding many utensils and other assorted household items hence they became suspicious. They arrested them and took them to the police station. In addition to this, they also recovered various phones from accused pockets and a wallet from the accused. P.W.1 was also called to check if any of the items recovered from the accused belonged to her and confirmed that indeed the items belonged to her and had been stolen the previous night.

The accused persons were then taken to Keroka Police Station and Sergeant Baraza organized an identification parade where all the accused persons were positively identified by P.W.1, P.W.2 & P.W.4. He then identified all house hold items belonging to P.W.1, the jackets worn by accused persons on the material night and the weapons used by accused persons Exhibit. 1 -34 respectively.

Lastly he confirmed that they received the items immediately after the robbery period i.e. after 1-2 hours after the robbery.

P.W.7 was Daniel Barasa attached at CID Office Nyatike though previously he was based at CID Keroka. He recalled that on 22/11/2011 at around 2.15 p.m. he was called by Cpl Charles from Keroka Police Station and was told to conduct a parade for the accused persons on allegation that on the night of 21st and 22nd November, 2011 they went to the home of P.W.4 and robbed her of her household properties and assaulted her with a panga.

He proceeded to arrange for an identification parade at Keroka Police Station and placed the 3 suspects among 8 members of same height and complexion. The witnesses were then called to come and see if they would identify the suspects. That the 1st accused was identified by all witnesses who came from Manga as one of the robbers who had attacked them. Furthermore, he told the court that he went to the cells, talked to each of the accused persons and they all agreed to appear before the parade. Also, he stated that before conducting the parade he asked them (accused) to avail their advocate if they had but they had none. He also asked the 1st accused whether he had any comment to make and he had none. He also told the court that the witnesses identified the accused persons by touching their shoulders and produced the identification form which was marked as MFI-28 and produced it as Exhibit No.28.

Furthermore, after conducting the first parade, he conducted another parade using different people and put the 2nd accused between the 3rd and 4th persons. The 2nd accused was identified and made no comments. He produced the 2nd accused identification parade as Exhibit No.29. The 3rd accused was also identified as he arranged for another identification parade and 3rd accused was placed between 3rd

and 4th person. The 3rd accused was also identified by the witnesses and he produced his identification parade form which was stating that the he conducted the identification parade with persons of similar height and complexion,

After the last witness testified none of the accused persons cross-examined him. The trial court noted that on this particular hearing of where P.W.7 was testifying all the accused persons turned violent and abused the trial magistrate and hence the court had to be cleared as accused persons caused a lot of commotion and attacked litigants in court. The trial court thus held that all the accused persons in this case had to be removed from court for the case to be heard as they were attempting to jump from the dock.

This marked the close of the prosecution's case.

The trial court after evaluating the above evidence rendered by the prosecution, the court ruled that the prosecution had presented sufficient evidence to warrant all the accused persons to be placed in their defence.

After Section 211 of the Criminal procedure Code was explained to all accused persons they all stated that they had nothing to say.

The trial Court in its proceedings noted that all accused persons turned out to be violent and attempted to escape and attack court orderlies in open court. Furthermore, that they (accused persons) uttered implinateole words at the time. The trial court, after noting the above conduct on all the accused persons closed the defence case.

In its judgment the trial court held that the prosecution had proved its case beyond reasonable doubt. The 3 accused were convicted of robbery with violence contrary to Section 292(2) of the Penal Code in Counts 1, 3, 4 and 5 respectively. The 3 accused were also convicted in respect of Count 2 Gang Rape Contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. Each accused person was then sentenced to serve 30 years imprisonment.

The above conviction and sentence by the trial court has triggered this appeal. In their home made petitions of appeal, the appellants herein; Eric Magwaro Ontumba, Andrew Gerare Ontumbo and Wycliff Nyamwaya Bundi have appealed against the entire conviction and sentence of the trial court on the following grounds: that they were not awarded a fair trial, the trial magistrate failed to comply with Section 211 of the Criminal Procedure Code, that they were not put on their defence, the identification parade conducted lacked merit since the complainant (P.W.1) saw appellant immediately he was arrested, they were not granted an opportunity for medical examination to certainly verify the allegation of rape of the complainant and lastly that the prosecution failed to avail evidence from the clinical officer which raises eye brows.

When the appeal came before us on 30th June 2015 each of the appellants handed in their written submissions. The 1st appellant herein Eric Magwaro Ontumbo 2nd appellant Andrew Gerare Ontumbo and 3rd appellant Wycliff Nyamwaya Bundi submitted on 5 grounds which are:

1. **Violation of Article 50 (2) of the constitution.**
2. **Violation of Chapter 46 Section 6 (iv) (c) (n) of the force standing order.**
3. **Contradiction and conspiracy**
4. **Questionable – position of source of light**
5. **Mode of raping was unexplained.**

On the first ground the 1st appellant submitted that he was supplied only with charge sheet and witness statements but he was not supplied with any other documents the prosecution relied on to secure his conviction which was a clear violation of ***Section 6 (iv) (b) of the forces standing Orders***. The appellant contended that the 3rd accused was taken to hospital immediately after they were arrested and P.W.1 identified them since they were the people suspected to have committed the offence Thirdly on the questionable source of light he submitted that since P.W.1's house source of light was a lantern lamp, he questioned how many lantern lamps could have been placed in complainant's house since according to witnesses testimony P.W.1's house had more than one room. Fourthly, he contended that the mode of rape was unexplained in the sense that the complainant was able to count just how many hours she spent with each of the accused and yet she (complainant) was able to carry a lantern lamp to each room. Lastly, the appellant contends that there was contradiction and conspiracy in the description in the clothes that the appellants wore on the material day. For instance according to the complainant's testimony, 1st appellant had a red jacket and blue trouser, 2nd appellant had a black jacket and 3rd appellant had a black jacket. While according to P.W.3, 2nd accused had a red jacket and 1st and 2nd accused had a red jacket. That notwithstanding, according to the evidence of P.W.6 Joseph Chirchir 1st accused wore a black jacket, 2nd accused red jacket and 3rd accused blue jacket. The appellants thus contends by submitting that there was not enough light from the lantern lamp and hence they did not see any of the appellants. In addition to this, the appellant contended that the complainant (P.W.1) took the P3 form to the doctor of her choice and was not escorted by any police officer to ensure that the information on it was correct.

The above appeal was opposed by the State however, before the State proceeded with its submission Mr. Otieno learned Counsel for the State submitted by notifying the appellants that he would be seeking enhancement of sentence from 30 years imprisonment to a death sentence as that is the mandatory sentence provided by the law. The appellants on their part even after being notified chose to proceed with the appeal.

Mr. Otieno learned Counsel for the State in opposing the above appeal proceeded by submitting as follows;

On ***Article 50 (2) (g)*** he submitted that the said witness statements were supplied before the trial took off and when the trial actually proceeded none of the appellants talked of the statement and were all actually ready to proceed. Thus he submitted that there was no evidence that ***article 50 (2) (j)*** was violated. Secondly on ***Section 46 (iv) of the forces standing Orders*** on the conduct of the identification parade he submitted that the same were properly conducted in reference to ***page 47.*** (P.W.7) testimony thus all the appellants confirmed that they did not have any query on the identification parade. Furthermore, he submitted that on the issue that the witnesses saw the appellants before the identification parade he submitted that P.W.1, 2 and 4 only went to the police station to identify appellants and there was nothing to indicate that they had seen the appellants before the parade.

On identification by source of light he submitted that P.W.1 had stated in her testimony that there was already a lantern lamp that was on before the appellant stormed.in.

On the mode of rape he submitted that P.W.1, P.W.2 and P.W.4 all attested to the fact that they saw the appellants raping P.W.4. On contradictory evidence he submitted that all the four clearly saw the 3 appellants at the scene and the appellants faces were not also covered. Furthermore that the 1st appellant was armed with a Somali sword, 2nd appellant with an axe and 3rd appellant was armed with a panga. In addition to this that the attack lasted for over 4 hours and therefore there was enough time for identification.

Lastly Mr. Otieno submitted by stating that all the ingredients of robbery with violence were proved by the prosecution against all the three appellants, and the fact that gang rape was also proved beyond all reasonable doubt. He thus urged the court to dismiss the above appeal and substitute the 30 years sentence with the mandatory death sentence.

The 2nd appellant in reply to the above submission by the State submitted in reference to the lantern lamp and stated that when he was arrested the complainant came to the hospital where he was identified before being taken to the police station.

The 3rd appellant on the other hand, submitted and stated that he was taken to the hospital where P.W.1 was before he was taken to the police station that he was arrested at Enkara and he stayed in prison for two months.

This appeal before us is a first appeal and in this regard our duty as the first appellant court is to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter remembering only that we did not have the privilege of seeing and hearing the witnesses who testified in the lower court. Generally see ***Pandya .v. R {1957} E.A 336, Okero –versus- Republic {1972} E.A. 32 and Selle & Another –versus- Associated motor Boat Co. Ltd & Others {1970} E.A. 123.***

We have now carefully reconsidered and evaluated all the evidence afresh. We have also weighed and considered the judgment of the trial court. We have also considered all the submissions and from an analysis of all the above, we note that the appellants' appeal turns on the following issues:-

1. **The identification of the appellants by the complainants.**
2. **The manner in which the identification parade on the appellants was conducted.**
3. **Whether the appellants gang raped the complainant.**
4. **Did the prosecution's evidence proof charges of robbery with violence**
5. **Whether the sentence of the trial court should be enhanced from 30 years to the death sentence.**

With regard to the first issue on the manner in which the appellants were identified by the complainant P.W.1 in her evidence in chief stated as follows:

"I heard the door being broken and some people entered the house. They came to where I was sleeping. They woke up and asked for money from me. The lantern lamp was still on. They were 3 people I saw them through the light of the lantern lamp-……. the 1st, 2nd and 3rd accused persons were not masked and I saw them clearly. The 1st accused was armed with a Somali sword, 2nd accused had an axe, and 3rd accused had a panga. The accused stayed in my house for more than 4 hours."

P.W2 a niece to the complainant (P.W.1) stated as follows on how she was able to identify the accused persons in her evidence in chief:-

"The robbers were not in a hurry to leave and stayed for more than 4 hours at the house and I saw them clearly and the lantern lamp was on. They were not masked."

While P.W.4 on how he identified the appellants in the house stated as follow:-

"The thugs entered the house and hold us told us to lie down. They were three of them. There was a lantern lamp which was on and had not been put off. I saw all the 3 accused persons well

and the lighting was clear even."

All the above witnesses P.W.1, P.W.2 & P.W.4 were in P.W.1's house on the night of the robbery. All of them attested to the fact that they were able to identify the appellants because:-

1. **There was a lantern lamp which was on all through from the time the appellants entered the appellants house until the time they left.**
2. **The appellants faces were unmasked.**
3. **The appellants spent over 4 hours with the witnesses in P.W.1's house therefore they had ample time to see all the appellants facial and body structures.**

The law as regards identification under difficult conditions now well settled in the case of ***Cleophas Otieno Wamunga –versus- Republic –Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu the court*** stated as follows:

"We now come to the more troublesome part of this appeal namely the appellant's conviction on Counts 1 and 2 charging him with robbery of Indalewa (P.W.1) and Lilian Adhiambo Wagule (P.W.3). Both these witnesses testified that they recognized the appellants among the robbers who attacked and robbed them…..what we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice is of vital importance that such evidence is examined carefully to immunize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendants in reliance on the correctness of the identification. The way to approach the evidence of visual identification was scantly stated by *Lord Widgery C.J in the well known case of Rumbull –-versus- Republic {1976) KLR 549 at page 552* where he said:-

"Recognition may be more reliable than the identification of a stranger, but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

The complainants, P.W.2 & P.W.4 were in the company of all the three appellants in P.W.1's house for over 4 hours. The appellants' faces were unmasked, there was a lantern lamp on during the whole time the appellants were in the complainant's house and the witnesses even described the weapons which had been carried by the appellants. All these facts in my humble view convince me beyond all doubt that the circumstances under which the appellants were identified by the complainant P.W.2 & P.W.4 were favourable and the appellants contention that the circumstances under which they were identified were not favourable lack merit.

With regard to the manner in which the identification parade was carried out ***Order 6 (c) and (d)*** of the standing orders provides as follows:-

6 **(a)……**

(b)……

(c) The witness or witnesses will not see accused/suspect before the parade.

(d) The accused suspect person will be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as him/her. Should the accused/suspect person be suffering from many disfigurement steps should be taken to ensure that it is not specifically apparent. Not more than one accused/suspect person should appear on identification parade.

The appellant complaint is that the witnesses (P.W.1) saw them before the parade (i.e. they were in the same vehicle). According to the evidence of P.W.6 (the arresting officer) once they received reports of the robbery, they proceeded to the scene and on getting there they first took the complainant to Masaba Keroka Hospital. They then returned home, interrogated her family members and then on the same night they started searching for the robbers. On reaching Kijauri they saw 3 people who were standing on the road with big luggages. They searched the luggage of the suspects and found many utensils and other assorted household utensils and became suspicious. They then took all this items to the police station.

According to the evidence of P.W.1 including evidence in chief she stated:-

“I was taken to Keroka District Hospital the same night. I was treated. I was admitted and the following day I was discharged the suspects were immediately arrested. I was in hospital and they were brought to the hospital and I positively identified all the 3 accused.”

The evidence of P.W.1 clearly states that the appellants were brought to hospital by P.W.6 for her to identify them. This clearly means that prior to the identification parade being carried out she saw the appellant and confirmed to P.W.6 that indeed this were the people who had robbed and gang raped her. In my humble view what the police should have done is not subject P.W.1 to an identification parade of the appellants since she had already identified them in hospital moments after they had robbed her. The mere fact that P.W.1 participated in the identification parade carried out by P.W.7 does not render the entire exercise of the identification parade worthless as P.W.2 and P.W.4 also participated in the said parade which according to the unrebutted evidence of P.W.7 was conducted in accordance to the provisions of Order 6 of the Forces Standing orders and the appellants were identified by the witnesses as the persons who robbed them on the material night.

With regard to the 3rd issue of whether or not the appellants gang raped the complainant, the complainant stated her evidence as follows:-

“The 1st accused then took me to another room and started to rape me infront of my children. My mother in-law was taken to sitting room. (1st accused) raped me for 2 hours. The 2nd accused came and took me to the corridor and raped me for another hour. Then the 3rd accused took me outside and raped me for another one hour”

P.W.2 also corroborated P.W.1’s testimony that she (P.W.1) was gang raped when she stated:-

“The 2nd accused went and got hold of my auntie and took her to a different room and raped her. The other accused persons also raped my auntie. The rooms are adjacent to each other and I could clearly see the accused persons rape my auntie. The 3rd accused then took her to the corridor and raped her. The 1st accused raped he in the room that we were sleeping.”

P.W.5 the clinical officer who examined P.W.1 also corroborated the fact that P.W.1 had been raped when he stated:-

“There were bruises to the labia and broken hymen. There was a swelling to the cervix. He was tender. There were bruises in the vagina wall. There was a whitish vagina discharge…….we concluded that there was penetration”.

From the above testimonies the evidence of P.W.1 was clearly corroborated by that of the clinical officer P.W.5. Therefore there is no doubt in our minds that the appellant gang raped P.W.1.

On the issue of whether or not the charges of robbery with violence were proved against the appellants. The ingredients of this offence were well set in the case of ***Oluoch –versus- Republic {1985} KLR 549.*** These are:-

i. **That there are two or more assailants or**
ii. **The assailants are armed with dangerous and/or offensive weapons or**
iii. **Violence is visited upon the victim in the course of theft.**

In ***Mohammed Ali –versus- Republic (2013 (KLR)*** where it held the use of the word OR in this definition means that proof of any one of the above ingredient to is sufficient to establish an offence under ***Section 296 (2) of the penal Code.***

In this case the evidence is that there were 3 assailants (appellants). They were armed with an axe, a panga and a somali sword. According to the evidence of the complainant the appellants were talking to her and saying that they wanted to cut her head. P.W.5 also attested to the fact that he classified the injuries on P.W.1 as harm. The appellants did not only sexually abuse and harm the appellant but they also stole from her. The appellants stole kitchen utensils, maize 20kgs, beans 15kgs, blankets, milking jelly and assorted clothes. This evidence was corroborated by P.W.6 arresting officer who recovered all the above goods approximately 2 hours after the appellants had violently robbed the complainant and her family. Therefore from the above evidence the appellant were guilty of the charges of robbery with violence.

Lastly, on whether the sentence against the appellant should be enhanced from 30 years imprisonment to the mandatory sentence of robbery with violence which is death. As we have stated at the onset of this judgement the appellants faced charges ranging from robbery with violence, gang rape, and handling stolen property. The trial court in turn convicted the appellants on the Counts of robbery with violence and gang rape and that notwithstanding, the appellants were sentenced to 30 years imprisonment!. Before the above appeal proceeded before us the appellants were warned by the State that should they wish to continue with this appeal the State would urge this Court to enhance the 30 year sentence to death sentence should the charges of robbery with violence be confirmed by this court. Even after the above warning, the appellants nevertheless, chose to proceed with his appeal.

As we have demonstrated above, the charges of robbery with violence and gang rape were proved by the prosecution before all reasonable doubt. The only sentence to be accorded to the appellant once charges of robbery with violence have been proved is the mandatory sentence according to ***Section 296 (2)*** which is death.

We therefore dismiss the above appeal by the appellants as the same lacks in merit. We uphold the trial courts conviction of the appellants but substitute the appellants sentence from 30 years imprisonment to the death sentence as the mandatory sentence as provided for under ***Section 296 (2) of the Penal Code.***

Orders accordingly.

This judgment applies mutatis mundantis to Criminal Appeals 175 of 2012 and 176 of 2012, Andrew Gitare Ontubu and Wycliff Nyamwaya Bundi respectively

Dated and **delivered** at **Nyamira** this **11th day** of December 2015.

C.B. NAGILLAH

JUDGE

In the presence of:-

Erick Mwagwaro Ontumbo

Andrew Getare Ontumbo Respondent

Wycliff Nyamwaya Bundi

Mercy -Court Clerk