



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO.90 of 2016**

*(From SPM's Webuye Cr.No.1646 of 2011 by: Hon. S. N. Abuya (PM))*

KENNEDY TOILI BARASA.....APPELLANT

V E R S U S –

REPUBLIC.....RESPONDENT

**JUDGMENT**

**Kenney Toili Barasa**, the appellant, was jointly charged with Tom Barabara Wawire with several offences.

They are as follows:

**Count I: Robbery with Violence Contrary to Section 296(2) of the Penal Code.**

**Particulars:**

**1. Tom Barabara Wawire 2. Kennedy Toili Barasa: On the 21<sup>st</sup> day of December, 2011 at about 3.30 a.m. at Particulars withheld Village in Particulars withheld Location within Bungoma North District of the Bungoma County, jointly with others not before court while armed with dangerous weapons namely metal bars, pangas, simis and torches robbed BENSON OJILI ANGUCHE of a mobile phone make Nokia 1100i, one torch and cash Kshs.500/= all valued at Kshs.4,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said BEN OJILI ANGUCHE and killed DAN ANGUCHE and JAMES TOM ANGUCHE.**

**Count II: Robbery with violence Contrary to Section 296(2) of the Penal Code.**

**Particulars:**

**1. Tom Barabara Wawire 2. Kennedy Toili Barasa: On the 21<sup>st</sup> day of December, 2011 at about 3.30 a.m. at Nzoia Village in Ndalul Location within Bungoma North District of the Bungoma County, jointly with others not before court while armed with dangerous weapons namely metal bars, pangas, simis and torches robbed JUDITH KISANDA a mobile phone make Nokia 1100 and cash Kshs.6,320 all valued at Kshs.10,320 and at or immediately before or immediately after the time of such robbery used actual violence to the said JUDITH KISANDA.**

**Count III: Gang rape Contrary to Section 10 of the Sexual Offences Act No.3 of 2006:**

**Particulars:**

**1. Tom Barabara Wawire 2. Kennedy Toili Barasa: on the 21<sup>st</sup> day of December, 2011 at about 3.30 a.m. at Nzoia Village in Ndalú Location within Bungoma North District of the Bungoma County, jointly with others not before court and while in the company of each other intentionally and unlawfully penetrated with their penises, one after the other, the vagina of J K without her consent.**

**Count vi: Defilement Contrary to Section 8(1) and (4) of the Sexual Offences Act:**

**Particulars:**

**1. Tom Barabara Wawire: On the 21<sup>st</sup> day of December, 2011 at about 3.30 a.m. at Nzoia Village in Ndalú Location within Bungoma North District of the Bungoma County, unlawfully and intentionally caused his penis to penetrate into the vagina of H K O a child aged 11 years.**

The appellant who was the 2<sup>nd</sup> accused in the trial court was convicted on Counts 1, 2, 3 and 6. He was sentenced to serve life imprisonment on Count 1 while the other counts were left in abeyance.

The appellant being dissatisfied with the said conviction and sentence preferred this appeal on the following grounds:

1. ***That the trial magistrate failed to consider the first report;***
2. ***That the appellant was never mentioned in the first report;***
3. ***That the evidence of the prosecution was full of contradictions;***
4. ***That the conditions were not favourable to proper identification.***

He prayed that the conviction be quashed, sentence set aside and he be set at liberty forthwith.

The appellant also filed submissions which reiterated the above grounds.

**Ms. Njeru**, counsel for State opposed the appeal. She stated that the complainants lived in one big homestead where they were attacked; two lives were lost; that the wife and daughter of B A (PW2) were raped/defiled; that the attackers were armed, they injured B PW2, his wife PW3 and daughter PW4; PW2 was assaulted using a metal bar. Later an identification parade was conducted but the 1<sup>st</sup> accused was picked out but not the appellant; that later the appellant was placed at the scene by the report of the Government Analyst arising from DNA testing samples drawn from the appellant, PW3 and 4. Counsel urged the court not to interfere with the findings of the trial court.

This is a first appeal and it behooves this court to evaluate all the evidence adduced before the trial court afresh, analyze it and draw its own conclusions but always bearing in mind the fact that it is the trial court which had an opportunity to assess the demeanor of the witnesses. See **Kiilu v Republic [2005 KLR 175]**.

In the lower court, the prosecution called a total of 9 witnesses; **PW1 Peter Wanyama**, a Clinical Officer at Webuye District Hospital produced a P3 form in respect of **B A** – (PW2) (1<sup>st</sup> complainant). PW1 found PW2 to have tenderness on the shoulder, reduced movement in the upper arm with deformity of the right hand; X-Ray revealed fracture of one finger; PW2 also produced a P3 form in respect of **J K** PW3, (2<sup>nd</sup> complainant) who complained of having been raped but had no injuries; PW1 also filled a P3 form for **H.K.A. (PW4)** (6<sup>th</sup> Complainant) a girl aged 12 years old who complained of sexual assault. He found that PW4's hymen was missing, external genitalia were swollen and so was the cervix. He produced the treatment notes and P3 forms as exhibits.

**PW2 B O A** recalled that he was at his home at Ndalú on 20/12/2011 with his wife PW3 and 3 children and went to bed about 10.30 p.m. About midnight, he heard people talking outside, peeped outside

through a hole in the window and saw people outside his bedroom. He flashed a torch at the hole and the people ordered him to open. He asked who they were and one said that they if he did not open, they would break in and kill him. They mounted a metal in the window and started breaking it.

They threatened to shoot, the door was hit open; PW2 armed himself with a torch and panga and waited at the bedroom door, the intruders broke the door, three people entered armed with metal bars; that one had a mask while others had caps. He tried to cut one but was hit by another on the hand and the panga fell; they demanded for their M-pesa pin numbers which they gave and they transferred the money to their phones. He heard the daughter H.K. (PW4) scream and somebody scream outside, which was the voice of his brother T A. PW2 said he lost consciousness for a while and when he came to, people were still talking in the sitting room. He heard his mother screaming then the sound of a motor vehicle and the robbers feared there may be danger and the person who had been guarding him left and the wife lit a lamp. He found PW4 lying in a pool of blood and brother PW3 & 4 told him that they had been raped/defiled. He went out and found the brother lying on the ground in a pool of blood. In the parent's house, the mother was, injured and the father was on the ground groaning. He went to call his brother and they reported the matter to police; PW3, PW4 and the mother were taken to hospital. On going back home, he found the police had removed the bodies of his brother and father; that on 22/12/2011, police went to his house with a cap and metal bar which he identified. On 24/12/2011, the OCS took them to attend an identification parade where PW2 only managed to identify the 1<sup>st</sup> accused. He denied having seen the appellant before.

**PW3 J K K** (2<sup>nd</sup> complainant) wife to PW2 recalled the attack on 20/12/2011 and reiterated what PW2 told the court. The robbers took her cash Kshs.6,320/= and Nokia 1100. One slapped her, took her outside saying he was going to rape her. Two people took her outside as she pleaded with them because she was pregnant. She was taken behind the house and one raped her and took her back to the house. They also enquired from her who was in the other houses and she told them. She heard one saying a person had walked out of the house and they ran out, then she heard a loud cry. She heard PW4 cry, then the sound of a motor vehicle and they ran out. She found PW2 had been injured and PW4 had been defiled and was lying in a pool of blood. They later went out and found her brother in law Tom, lying lifeless. Her father in law, and mother in law were injured.

The matter was reported to police. She was taken to Ndali Health Centre with PW4, then Kitale Hospital. Later she identified accused 1 on an identification parade.

**PW4 H.K.** a child aged 12 years recalled that she was asleep with her parents in the same house when they were attacked. She reiterated what PW2 & 3 told the court. She added the taller person in the group of robbers went where she was sleeping asked her whether she had been defiled and she denied. He took off her panty and defiled her and when she tried to scream, she was strangled her on the neck. The robbers left and her mother lit a lamp. Next day they went to hospital with the mother, where they were treated while her grandmother was admitted at Kitale Hospital. She identified one robber by voice – one who asked if she had ever been defiled accused 1. She did not identify the appellant.

**PW5 Cpl Vincent Maganga** of Brigadier Police Post on 22/12/2011, acting on a tip off, from members of public, arrested accused 1.

**PW6 Ip. Peter Momanyi** who was then Deputy DCIO Bungoma West conducted a parade where accused 1 was identified by PW2, 3 and 4 but none identified the appellant.

**PW7, Charles Shikono Andole** was on 20/12/2011 about 5.00 p.m., taking alcohol in one home together with accused 1 and the appellant whom he knew well. Later at 3.00 p.m., a lady called Phoebe called to inform him that thugs had attacked R. He went to the scene, but did not find anybody. They went to check on R next day and one Dan told him to go to A's home where they found mzee A and his son dead. He later passed at Kennedy's (appellant) home and his sister N told him that the appellant had been assaulted the night before and was drenched in blood but had not gone to hospital. Next day, the Asst. Chief and 3 police officers went for him, handcuffed him and told him that the appellant wanted to see him. He found the appellant at police station and the appellant told him that the police had asked

whom he had been with the previous day from 2.00 p.m. and that is why he mentioned him. He recorded his statement and was released.

**PW8 Henry Kiptoo** a Government Analyst produced a report in respect of some exhibits received for analysis.

A brown cloth in envelope – ‘A’

Blood sample in bottle Ex.B for the appellant Kennedy Toili Barasa

Ex.C – blood sample for Tom James Anguche

Ex.D – a pair of brown Khaki shorts

A light orange under pant in khaki envelop - E. for Judith Kisanda

A pink under pant in an envelop F for H. minor.

Multi coloured skirt (G) – Ex.15 for H.O. (PW4).

The objective was to determine presence of blood or semen and possible origin.

On examination, PW8 found that Ex.A cloth and skirt Ex.G were moderately stained with human blood; the light orange under pant Ex.E was lightly stained with seminal stains. No blood/semen were found on trouser shorts and pink under pant Ex.F.

As for the DNA profiles, he found that DNA profiles generated from the orange pants (Ex.E.) matched those generated from blood sample of Kennedy Toili Barasa. Secondly, the DNA profile generated from blood stains on the skirt (G.) were a mixture of the DNA profiles generate from blood samples of Kennedy Toili Barasa and unknown female.

**PW9, Dr. Blastul Kakundi** of Endebes District Hospital produced postmortem reports prepared by Dr. Muhola on 28/12/2011 in respect of D A who had injuries on the chest, ribs on right side were fractured; there was blood in the chest cavity. He found cause of death to be injury to the chest, fractured ribs and blood in the chest. Another report was in respect of Tom J A. He was cut on the back of the head, the skull. Cause of death was found to be the head injury.

After close of prosecution case, the appellant opted to give an unsworn defence. He stated that on 20/12/2011, he worked on a tractor went to take some alcohol after work till 9.00 p.m.; that while near his grandfather’s land, he was knocked by a bicycle which had no lights and the cyclist did not stop. His wife was not home. He slept and next day, he informed his brother that he had been hit by a bicycle and was in pain.

He went to hospital and was arrested by police who alleged that he was robbery suspect. While at police station, blood was drawn from him and an identification parade was conducted.

The appellant faced a charge of robbery with violence (count 1 & 2) gang rape and defilement.

This being a criminal case, the burden of proving these offences lies squarely on the prosecution. In an offence of robbery with violence, the prosecution has to prove beyond any doubt any of the following ingredients:

- a. ***The offender was armed with 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..... (See Oluoch v Republic (1985))***

**KLR.)**

In the instant case, PW2, 3 and 4 vividly narrated the events of the fateful night. PW2 said that the robbers who entered his house were three; they were armed with iron bars with which they assaulted PW2, PW1 confirmed the injuries that the witnesses sustained. PW2 and 3, narrated that cash money was taken from them, money was withdrawn from their M-pesa accounts and lastly, his brother and father who lived in the same compound were violently slain. Violence was also visited on PW3 who was raped though she was pregnant and on PW4 a small child of 12 years.

I am satisfied that all the three ingredients necessary to prove an offence of robbery with violence were proved.

The only other issue is whether the appellant was positively identified as one of the robbers.

As pointed out earlier in this judgment, none of the prosecution witnesses PW2, 3 and 4 positively identified the appellant as being at the scene on the night of the robbery. PW3 identified her pink under pant Ex.8 and brown checked blood stained skirt Ex.9 which were forwarded to PW7, the Government Analyst for analysis.

The appellant also admitted in his defence that blood was drawn from him, marked as B (Kennedy Toili Barasa), Although PW3 did not allude to her under pants being taken by police, she claimed to have been raped too. PW7 was required to determine the presence of blood or semen on the exhibits and whether they had any relationship between them and blood taken from the appellant for DNA sampling. PW7, after analysis, concluded that the DNA profile generated from the orange under pants item E, belonging to PW3 matched that generated from blood sample of Kennedy Toili Barasa (B) the appellant. Secondly, PW7 found that the DNA profile generated from the blood stains on the skirt marked G, belonging to PW4 were a mixture of the DNA profiles generated from the blood samples of Kennedy Toili and unknown female.

The skirt Exh.15(G) belonged to PW4 and therefore the unknown female must be PW4. The findings of the Government Analyst connected the appellant to the rape and defilement of PW3 and 4. That finding placed the appellant squarely at the scene of crime. The person who raped PW3 and 4 was part of the group of robbers. The appellant's defence is but a bare denial and unbelievable. Both PW3 and 4 told the court that they were each raped/defiled by one person and I am satisfied beyond any doubt that it is the appellant and therefore the trial court arrived at a correct finding in Count IV that pw3 was not gang raped but was raped by a single person, the appellant.

Like the trial court, since the DNA evidence placed the appellant at the scene; I am satisfied that the prosecution proved that the appellant is one of the people who robbed PW2 and 3. It is during the robbery that D A and James T Ae met their death. I also find that it is the appellant who raped PW2 and the convictions on Counts I, II and III are sound.

Unfortunately, the police never charged the appellant with defiling PW4 in Count VI. It is only his co-accused who was charged but was acquitted. This court has no idea why the prosecution made such an omission when they had such direct evidence connecting the appellant with defiling PW4. Since the appellant was not charged with defiling PW4, I find that the trial court erred in convicting the appellant on Count VI for which he was not charged.

The appellant is therefore acquitted of Count VI.

I find the conviction in regard to Count I, II and III to be sound and the court finds no good reason to disturb them. The appellant was properly sentenced to life imprisonment on Count I while the other counts were held in abeyance. The appeal lacks merit as respects Count I – III and is hereby dismissed in its entirety.

**Signed and Dated** at BUNGOMA this 23<sup>rd</sup> day of November, 2018.

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**R.P.V. Wendoh**

**JUDGECoram:**

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present