



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduati v Republic (Criminal Appeal 32 of 2018)  
[2025] KEHC 10000 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10000 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL 32 OF 2018  
EM MURIITHI, J  
JULY 10, 2025**

**BETWEEN**

**JULIUS KAMANDE NDUATI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both conviction and sentence from original conviction in Criminal Case No. 1641 of 2015 delivered on 23rd April 2018 at Baricho Law Court by E.H. KEAGO (SPM))*

**JUDGMENT**

**Introduction**

1. The appellant Julius Kamande Nduati was convicted and sentence to death on 24/4/2018 for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* with particulars that he had “on the night of 1<sup>st</sup> and 2<sup>nd</sup> day of October 2015 at Kiang’ombe village in Kirinyaga West within Kirinyaga County robbed Antony Waweru Mukingo of his pair of shoes and a trouser all valued at Ksh.4000/- and at or immediately before or immediately after the time of such robbery fatally wounded the said Antony Waweru Mukingo.”
2. The appellant was dissatisfied by both conviction and sentence imposed and has raised four grounds of appeal principally on sufficiency of evidence to convict as follows:
  1. That the learned trial magistrate erred in law and fact by denying me of my right to cross examine the evidence of PW11.
  2. That the learned trial magistrate erred in law and fact by convicting me without proper finding that the investigation of this case is shoddy.
  3. That the learned trial magistrate erred in law and fact by convicting me yet the evidence of PW4, PW5 and PW11 on recovery is contradicting hence unsafe to sustain conviction.



4. That the learned trial magistrate erred in law and fact by convicting me without proper finding that the identification of exhibited items is contradicting hence not sufficient to sustain conviction.”

## **Evidence before the trial Court**

### **The Prosecution’s case**

3. The Prosecution called eleven witnesses to prove the charge and their testimonies are as follows:

PW1 Ruth Gathiga Muriuki

She stays in Mungara. She stated that on the 1/05/2015 in the morning she called her herds’ boy to wake up and milk the cows but his phone was not working. Her husband then went to check the herds-boy but he didn’t find him as the house was locked. He returned and they milked their cows and sold the milk. At 10.30 am while picking tea with two others she heard people screaming from the road side.

She proceeded there where she found her herd’s boy injured seriously and he didn’t have his trouser on. She was able to identify him by the checked shirt. While there APC Munene came and they noticed that he was still a life so they rushed him to KCH where he was admitted for treatment. She stated that on 7/10/2015 she was called to the AP post where she identified the trouser which belonged to the victim. She also identified the shoes the victim was putting on when he left home on the 30/9/2015. She was informed that someone had been found with the clothes and shoes which were suspected to belong to the victim. She identified the pair of jeans trouser as MFI-1 and brown booths shoes as MFI-2. She later learned that her herd’s boy had died while undergoing treatment. She stated that when they found him he couldn’t speak nor open his eyes. She admitted that the accused was not known to him before.

PW 2 Wilson Fundi Wachira

He lives in Kathithi village and a worker to Mama Ngatia stated that on 1/10/2015 at 6.00 pm Waweru showered and went for an evening walk. The next day he heard that across the river there was someone who had been attacked. He proceeded to the scene in company of his employer where he found that it was his fellow worker who had been injured and didn’t have his shoes and trouser on. The victim had a swollen head and his shirt was blood stained. The victim was taken to Kenyatta National Hospital (KNH) for treatment. On 6/10/2015 he was called to Muragara AP post where he went and he was asked on how the victim was dressed. He told the police that the victim was putting on a jeans trouser and brown shoes wood land type. He was then shown some shoes and jeans trouser he was able to identify them to belong to the victim and as the ones the victim had won when he left home the previous evening when he didn’t return. He identified them as MFI-1 and MFI-2 before Court. He stated that the accused was not known to him before.

PW 3 Lucy Wangare Mukingo

She lives in Gathaita village. She stated that on 2/10/2015 she was called and informed that her son was injured and admitted at KCH (Kerugoya County Hospital). She proceeded to KCH where she found her son had been transferred to KNH. She followed him there where she stayed for two days and passed on 3/10/2015. She noticed that the deceased had a cut wound on the head, eyes, and on the neck. On 8/10/2015 she was summoned by the OCS Baricho where she identified the deceased’s clothes which included a blue jeans trouser and



woodland brown shoes which she had seen the accused putting on before as MFI-1 and MFI-2. She admitted that the accused was not known to her before.

PW4 APC Peterson Munene Njogu

He works at Muragara AP Post. He stated that on 2/10/2015 he was called by the In-charge post that there was someone who appears to have been attacked at Kiang'ombe area. They proceeded there where they found the victim and in company of PW1 and PW2 they rushed the victim to KCH where he was admitted and later transferred to KNH. His co-worker reported that the victim had a touch screen phone a blue jean, and brown timber land shoes. The victim didn't have his shoes on and the trouser so they gave out information and on the 6/10/2015 they got information that there was someone who had been seen with such clothes the previous Sunday. They found him and lead him to his home where they conducted a search and recovered a blue jeans and timberland shoes. He identified them as the ones before court. He said that the co-worker had given the description of the jeans and timberland shoes. He was again called and he identified them. They were also identified by the employer. The accused then identified other 4 suspects whom they arrested and brought to Baricho police station. He identified the accused as the one they arrested on the said date and he escaped and later was rescued when he was under attack and as the one they arrested with the exhibits. When he was cross-examined he said that he was with his colleague AP CPL Alumasha when the exhibits were recovered from his house.

PW 5 CPL Benard Alumeri

He is of Muragara AP Post. He corroborated the testimony of PW4 on how they acted on information received and they managed to arrest the accused and recovered MFI-1 and MFI-2 which were identified to belong to the deceased victim. He identified the exhibits before court and the accused who they had arrested and he escaped before being re-arrested again. He further stated that the accused did mention some other suspects whom they also arrested and brought to Baricho police station. When he was cross-examined he said that he was with APC Benard Munene when MFI-1 and MF2 were recovered.

PW 6 David Mugo Gakure

He was the Chief Mukure location. He stated that on 2/10/2015 he was called by the village elder who reported that there was a person in the tea bushes who was unconscious. He proceeded to Muragara AP post where he made the report and the APC in his company they went to the scene where they found the victim with some serious injuries. He was rushed to KCH and late he was transferred to KNH. He said that he noticed that the victim didn't have his trouser and shoe when they found him at the scene and his shirt was shocked in blood.

PW7 Francis Mukingo

The deceased was his son.

On 13<sup>th</sup> October, 2015 he attended the postmortem at KNH. He identified the body.

PW 8 Robert Gatimu Mukingo

He stated on 13/10/2015 he went to KNH where they identified the body of his deceased brother for postmortem to be done. He admitted that the accused was not known to him.

PW9 Sgt Catherine Migwi



She is based at Baricho police station. She stated that on 7/10/2015 she was on duty at the station and five suspects were brought to the station by APCS from Muragara AP Post. They were suspected of having murdered the deceased in this case. She stated that the officers also hand her a blue jeans and Timber land shoes MFI-1 and MFI-2. He stated that he did record statement about the suspects and the exhibits. she identified the accused as among the five suspects who had been brought under arrest. She stated that the other suspects were released upon interrogation. She admitted that she didn't know what happened to the accused.

PW 10 Dr Benard Owino

He is a pathologist working at KNH hospital. He produced the Postmortem form which was filled at their facility in respect to the body of Anthony Waweru pursuant to a request that was made by the OCS Baricho police station. The body was identified by Robert Gatimu and another. The deceased died on 3/10/2015 at 9.30PM. He examined the body externally and internally and found the deceased died due to head injury as a result of blunt trauma. He signed the PM on the 13/10/2015 and duly stamped the same which he produced as EX3 in this case.

PW 11 PC Luke Rotich

He was based at Baricho police station. He stated that he was on duty on the 14/02/2017 then he got a report of a robbery with violence from the APCS of Muragara AP post. He visited the scene of robbery which he found had been disrupted however there some blood stains at the scene. He did record statement from the witness where he found that the deceased had left home the previous day and didn't return home only to be found on a foot path with serious injuries. He was rushed to the hospital and later he succumbed to the injuries. He also established that the accused was the one who had been found with the pair of trouser and timberland shoes which belonged to the deceased. He also established that the other four suspects who had been mentioned by the accused were not connected to the charges before court so he released them without any charges. He was Satisfied that the witnesses including the co-worker and the employer had positively identified the shoes and trouser which belonged to the deceased. He was therefore satisfied that it's the accused who committed the alleged offence. He produced the Trouser and the Timberland brown shoes as EX1 and EX 2.

### **Defence Case**

4. When put on his defence the accused gave an unsworn statement. He stated that on the 7/10/2015 at 10.00am while at his place of work when two police officers came and told him that there was some issue to discuss at the station. They took him to the post where he was placed in the cells until 5.00pm when he was brought to Baricho police station where he was charged with the present offence.

### **Submissions before this Court**

#### **Appellant's submissions**

5. The Appellant filed written submissions and urged that the prosecution had not established the offence to the required standard of proof. The appellant submits that the requirements whether the property is positively the property of the complainant. The learned trial magistrate herein failed to consider the jeans trouser and a pair of timberland shoes were items which anybody else could have them. The prosecution had the burden to prove that the exhibit in court belonged the complainant: The witnesses who were relied upon to prove that the exhibits belonged to the complainant had nothing



of any evidential value. For one the make of the pair of shoes and the pair of long trousers was not described in the charge sheet. Secondly, the colour of the jeans is inconsistent because some of the prosecution witnesses suggested two different colour: Blue jeans & black jeans. Although the doctrine of recent possession requires the accused person to explain on how the alleged items were recovered, may this Hon. court disregard the same because the prosecution which has the burden to prove their case beyond doubt herein failed to do so.

### **Respondent submissions**

6. For the DPP, written submissions urged that the Prosecution had proved its case on the basis of the doctrine of recent possession. They submit that the evidence of Pw-1 (Ruth Gathigia Muriuki), she was able to demonstrate that the [victim/deceased] was her employee for about 11 months and had been paid before she learned of his injuries and died while undergoing treatment at Kerugoya Hospital. The victim had no trouser and shoes which the witness confirmed to be the one that were found with the appellant. They submit that from the evidence of all witnesses, the trouser and shoes belonging to the victim/deceased were traced to the appellant some few days after he was found seriously injured.
7. Judgment was reserved.

### **Issue for determination**

8. The issue for determination by this first appellate court upon a reevaluation of the evidence (see *Okeno v. R* (1972) EA 32) is whether the evidence as a whole before the trial court has established the offence of robbery with violence c/s 296 (2) of the [Penal Code](#), and consequently, whether the appeal has merit and it should be allowed, conviction and or sentence/orders of the trial court quashed or set aside.

### **Determination**

9. The Court has, as counselled by *Okethi Olale v R* (1965) EA 555 considered as a whole the evidence presented to court by the Prosecution witness PW1-PW11 along with the unsworn statement of the accused/appellant when he was put on his defence.
10. On the record of the trial court, the court finds no merit in the lead complaint that the appellant was denied an opportunity to cross-examine a witness PW11. The record of the court shows that on 18/9/2017, following a request for another date to cross-examine the witness, the trial was adjourned to 19/9/2017 when the record of Court indicates as follows:

“PW11 RECALLED AND CROSS EXAMINED

I don't have any question for the witness.”

11. The appellant's complaint that the make of the pair of shoes and the pair of long trousers was not described in the charge sheet, is answered by the provisions of section 134 of the [Criminal Procedure Code](#) that the purpose of the particulars of the Charge is to give reasonable information as to the nature fo the offence as follows:

“134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged such, together with particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”



12. There was no significant discrepancy on the description of the colour and names of deceased's items as blue or black jeans, and the shoes described as brown by PW4, PW5, PW11, which were recovered by the police from the appellant's home. The witnesses account was consistent as to the brown colour of the shoes and discrepancy was on the record of proceedings showing them "timberland" or "timber land".
13. The descriptions of the jeans trousers as "Zeele", "Zeellal", "Zeezo" or "Zeezle" on the typed proceedings is insignificant as is the reference to the brown shoes as "brown timberland", "timber land shoes", which may be explained by the witnesses/trial court's spelling perceptions of the oral evidence of the witness. Significantly, the items were identified as belonging to the deceased by the two people he lived with, his employer PW1 and co-worker PW2.

### **Identification of the Appellant**

14. The Court of Appeal in *Gabriel Kamau Njoroge v Republic* [1987] KECA 4 (KLR) held:

"Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade."
15. No purpose was to be served by an identification parade in this case, where the appellant was arrested by member of the public after running off following the recovery of the deceased's stolen items at his home when the police went to look for him. The case against the accused was not that he had been seen robbing the deceased, but that he had been seen wearing the items which been stolen from the deceased who had been killed in a robbery only three days before. The case against the appellant did not depend on identification at all, and an identification parade would have been superfluous.

### **Doctrine of recent possession**

16. PW1 and PW2, respectively, the deceased's employer and co-worker testified as to going to the scene and finding the person seriously injured and without his trousers and shoes. PW4 the police officer who responded to a report and went to the scene said "we proceeded to the scene with my colleague and found someone injured unconscious and bleeding. He was bleeding from the right eye, mouth and nose. He also had a wound on head. He did not have his trousers and shoes. He only had an under pant." The deceased's trousers and shoes had been stolen by his attacker(s) during the attack when he was seriously injured. The offence of robbery with violence was complete.
17. The Court finds that the accused was properly convicted for the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#) on the basis of the doctrine of recent possession, as elaborated by *Arum v. R* (2006) eKLR having been found with the shoes and pair of jeans stolen from the deceased who was fatally attacked during the robbery and which were properly identified to belong to the deceased by the deceased's employer PW1 and his co-employee PW2 and were recovered three days after the robbery from the accused's home upon escort by the police as testified by the arresting police officers PW4 and PW5 of Baricho AP camp and the re-arresting officer PW9 of Baricho Police station.

### **Death of the Deceased**

18. The death of the deceased was proved by the evidence of the mother PW3, the brother PW8, the Doctor examining the body PW10 and the Investigating Officer PW11. The appellant did more than



mere wounding as required by the ingredients of robbery with violence under section 296 (2) of the [Penal Code](#).

### **Malice aforethought**

19. Had the appellant been charged with murder, the offence would have been proved. The malice aforethought on the part of the attacker is confirmed in terms of section 206 of the [Penal Code](#) by the nature of the injuries inflicted on the deceased victim which the attacker must have had (a) an Intention to cause the death or grievous harm, (b) knowledge that the act or omission causing death will probably cause death or grievous harm to the same person, (c) an intention to commit a felony.

### **Robbery with violence**

20. The Prosecution has proved the ingredients of the offence of robbery with violence, namely, as restated in *Oluoch v. R* [1985] KLR 549 that –

“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 other 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.”
21. In this case the nature of fatal head injuries as a result of blunt trauma indicates not just the ingredient of wounding but also the attacker being armed with a dangerous and offensive weapon.
22. The sentence of death passed on the appellant by the trial court was within the law as settled by *Muruatetu v R* (2017) eKLR and *Muruatetu II Directions* (2021) eKLR, clarifying the limited application of the ratio therein to murder cases and not to other capital cases as robbery with violence herein.
23. This Court has not found reason in the terms of the principles for appellate interference with sentencing discretion of the trial court (*Wanjema v. R* [1973] EA 493) to interfere with the sentence imposed by the trial court upon finding that the accused was not remorseful.

### **Orders**

24. Accordingly, for the reasons set out above, the court finds that there is no merit the appellant’s appeal and it is dismissed.

Order accordingly.

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearance

Mr. Mamba for the DPP.

Appellant/Accused in Person.

