



**Ndila v Republic (Criminal Appeal E048 of 2021)
[2024] KEHC 1346 (KLR) (12 February 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E048 OF 2021
RK LIMO, J
FEBRUARY 12, 2024**

BETWEEN

BONIFACE KAVULUKI NDILA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Boniface Kavuluki Ndila, the Appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*.
2. The particulars as per the charge sheet were that on the 4th November 2018 at about 7.45 pm at Mutha village, Mutomo Sub-County within Kitui County jointly with another convicted and others not before court while armed with crude weapons namely; panga, metal bar and “Rungu” robbed Josphine Muthini Kaloki of her mobile phone make Infinix valued at Kshs. 13,000.00 and cash of Kshs. 400.00 and immediately after the time of such robbery used actual violence to the said Josphine Muthini Kaloki, the complainant in the case.
3. The Appellant denied committing the offence and below is a summary of the evidence tendered by the prosecution and defence put up by the Appellant.
4. Josphine Muthini Kaloki (PW 1) the complainant in the case told the trial court that the incident occurred on a Sunday the 4th November 2018 and that after visiting her Mum for dinner she drove to her home using her motor vehicle registration number KBW 048J in the company of her niece Rose Kyalo. She stated that when she reached home and after opening her gate and her house she was accosted by two men who seriously injured her after a brief struggle. She stated that she was cut on the head and around the eye. She was also cut on the head and around the eye. She was also hit with a metal bar on the hand which got fractured in the process as she shielded herself from the attack. She stated that one of the assailants took a stool in her home and hit her with it making the stool break and as she



- screamed for help, she stated that her niece called her son named Joshua Kaloki who responded almost immediately by coming with workers and later joined by the police. She stated that the assailants took away her bag with her phone and Kshs. 4.00.00.
5. She further testified that she was taken to Mutha dispensary and later referred to Mutomo Hospital owing to the serious injuries she sustained.
 6. The complainant testified that she recognized one of the assailants as the Appellant herein as he used to work for her as a casual labourer. She stated that she also identified another assailant as Paul Kyalo Ndila adding that the robbers were four in total. She stated that the security light were on and the lights on the balcony was on as well. She stated that she recognized the two well adding that when identification was conducted by the police she picked the Appellant three times because she had known him since childhood. She stated that she easily picked out the Appellant and the other assailant and was confident that she would pick out the other two if they are arrested.
 7. Joseph Kamotho Kisuli (PW 2) a bodaboda rider from Mutha testified that on the material day at around 6.30 pm, the Appellant called him on phone asking that he wanted him to go to a place Katolongeni to pick some customers. He stated that when he reached the said place he found the Appellant and three accused men who wanted to be carried to Mutha. He stated that the carried the four as pillion passengers in his motor cycle registration number KMYU 590T SKYGO model.
 8. The witness testified that the Appellant asked him to drop them to Ilamba area within Mutha town and recalled that the site was near where the complainant (PW 1) had put up a house. He recalled that he charged them Kshs. 400.00 for transport and that it is the Appellant who paid Kshs. 200.00 with the other passenger paying Kshs. 200.00. He testified that the went about his business and at about 7.30. pm he heard that PW1 had been attacked and together with others rushed to the home of PW 1. He recalled that after the incident, the Appellant went underground for a while and that he knew him well because he was his Uncle. He stated that he had no knowledge of the mission the four had when he carried them stating that he was first picking and dropping them as pillion passengers.
 9. Mwendwa Kaloki (PW 3) on his part testified that on 4th November at around 8.00 pm he got a call from her mother Beatrice Ndunde and informed that the complainant had been attacked. He stated that the rushed to her home using a boda boda and on reaching there he found many people at her compound with complainant injured and bleeding from the head. He stated that he also found Joshua Kaloki, a Son to the complainant being put on a Land Cruiser before being taken to hospital as he had fallen unconscious.
 10. He testified that the following day the complainant told him that she identified two of the robbers and that the Appellant and one Kyalo Ndila who was arrested the following day. He stated that he was one of the people who went to apprehend Kyalo. He added that when PW 1 constructed her home he was one of the laborers hired to do casual work and the Appellant and the said Kyalo were also among the laborers hired. He added that the Appellant went into hiding after the incident and when he re-appeared he was arrested and confirmed that the was among the people who arrested him and his wife whom they accused of hiding the Appellant. He stated that they arrested the Appellant on 2nd July 2019 hiding in a store.
 11. Joshua Kaloki (PW 4) a Son to the complainant testified that on the material date and time he got a call from his Cousin Rose Kyalo that his Mother had been attacked. He stated that the mobilized four of his friends and rushed to the scene and found his mother in the sitting room injured and the house was in disarray. He stated that he quickly tried to search around the house but did not see any of the robbers. He said that he went back to the house and found the mother on the floor bleeding from the face and recalled seeing a broken stool next to her. He stated he had one look at his mother and the



- next he remembered was finding himself at the hospital in Mutomo where he learnt that he had fell unconscious out of shock. He stated he saw her mother the following day but he did not speak to her as he was still traumatized. He stated that later he spoke to her and she narrated to him how she was attacked and robbed and that she told him she was able identify the Appellant and one Kyalo Ndila as two of the attackers adding that they were four in total.
12. Mary Kaloki (PW 5), a Sister to the complainant also testified and stated that she also lived in Mutha and on the material time and date she was called and informed that her Sister (PW 1) had been attacked. She stated that she rushed to her house and found her lying down with blood all over. She stated that a Son to the complainant was also lying down having fainted upon seeing the condition of her mother. She stated that the complainant and her Son were rushed to hospital where they were admitted and that on 19th November 2018, her Sister (PW 1) was able to talk and narrated to her the whole ordeal including the fact that she recognized the Appellant and one Kyalo Ndila as one of the assailants.
 13. Rose Kyalo (PW 6) testified that she was with complainant (PW 1) when they were alone as the house help was away at the time. She stated that when they arrived home that evening, she opened the gate and when her Aunt (PW 1) drove in she closed the gate and went straight to open the door to the main house and headed to the kitchen.
 14. She stated that while in the kitchen, she heard PW 1 switching off the car's engine and shortly screamed. She stated she ran back through the back door and heard her being beaten and got scared and ran to the shamba and hid in a terrace from where she called Joshua Kaloki (PW 5) a Son to the complainant and reported to him about the attack telling him that his mother was being killed. She stated after the call she changed her position out of fear and hid in another terrace and when she heard motor bikes approaching she rushed and opened the gate for complainant's Son. She stated that she heard people fleeing as she opened the gate. She testified that when PW 5 saw his mother, he fainted and that police shortly arrived with more people rushing in the rescue. She stated that she did not see the attackers.
 15. Dorcas Muthini Kiema (PW 7) a Clinical Officer based at Mutha Health Centre testified that she was the first Medical Officer to attend to the complainant at Mutha Dispensary before she referred her to Mutomo Mission Hospital for further treatment. She stated that the complainant was seriously injured and was later referred to Kikuyu PCEA Hospital for further treatment. She tendered discharge summary from Mutomo Mission Hospital as P exhibit 1, Referral medical form as P exhibit 2, a copy of medical bill of Kshs. 129,000.00 as P exhibit 4, a CT scan showing a fracture as P exhibit 5, P3 form she authored as P exhibit 7. She stated that the complainant was not talking when she taken to the dispensary.
 16. David Uka (PW 8) the Investigating Officer in the case testified that he received a call on 4th November 2018 at around 10.00 pm from his boss informing him about a robbery incident at Mutha. He stated that he headed to Mutomo Hospital with other officers to check on the victim as he was notified that she had been taken there. When he reached at Mutomo Hospital, he stated that he found the complainant in a bad state with her head cut and a swelling on her right hand. He testified that they left her undergoing treatment and the following day he went back and met one Mutini Kaloki who narrated to them how the incident occurred. He stated that he visited the scene and found a lot of blood stains on the floor adding that he robbers gained entry in the compound by cutting a chain link forming the fence and had escaped using the same place that they had cut the chain link. He testified that they recovered a broken stool, a broken broom and a metal rod used to attack the complainant. He tendered the stool as P exhibit 8, the broken broom P exhibit 9 and a metal bar as P exhibit 10.
 17. He testified he recorded statements from witnesses and that when identification parade was conducted the Appellant was positively identified by the complainant. He added that he robbers went into hiding



- after the robbery but two of them were known and were later arrested by members of the public adding that the Appellant was among the two arrested. According to him, the two other robbers were strangers in the area and disappeared in Nairobi after the incident. He testified that when he went to the scene of the robbery he saw a security light mounted at the top of the house and that the security light helped the complainant identify two of the robbers as they were well known to the complainant.
18. He stated that after the robbery the four robbers fled to Nairobi adding that he traced the Appellant using intelligence report catered including use of call data provided by Safaricom.
 19. When placed on his defence, the Appellant stated on oath that prior to this arrest, he was burning charcoal on his father in law's farm. He stated that on 2nd July 2019 when he was at the house of father-in-law, Mwendwa (PW 3) whom he knew well arrived and asked him if he could get him thirty bags of charcoal and that he gathered thirty bags of charcoal and packed the same on his vehicle and asked him to pay because they had agreed at Kshs. 450.00 per bag.
 20. He testified that PW3 told him to board the vehicle promising to pay him at Mutha town. He stated that they arrived at Mutha town at 7.00pm and that he told them to take tea in one of the hotels. He stated that PW 3 later appeared with three people and arrested him and took him to Mutha Police Station and from where he was later charged with the offence of robbery with violence.
 21. He confirmed that while at Police Station, he saw the complainant, a woman she well knew went to the Police Station and identified him in an identification parade. He stated that the complainant picked him up because she knew him. He denied committing the offence. He faulted the Investigation Officer for saying that he traced him to Nairobi without telling the court the number he was using to trace him.
 22. He raised alibi stating that he was at the home of his father-in law at the material time with his wife and when pressed under cross-examination on whether he was calling the wife as a witness, he stated that the wife had eloped with another man when he was in custody. He stated that he was a Christian and on the material day he went to Church while his father in law's home. He denied knowing Paul Kyalo who was also arrested and charged for the same offence.
 23. The trial court evaluated the evidence tendered and found that the prosecution's case had proved all the ingredients of the offence upon which the appellant was charged. The trial court found PW1 credible and found that violence inflicted on her had been proved through the exhibits tendered in court.
 24. The trial court dismissed the defence by the Appellant that the first report stated that the complainant was attacked by unknown people. The trial court found that the person who made the report was Rose Kyalo (PW 6) and not PW 1 because at the time the report was booked, the complainant was admitted in hospital. The trial found that the evidence of PW 2 corroborated the complainant's evidence on identification. The Appellant was found guilty and convicted and sentenced to serve death sentence.
 25. Aggrieved by the conviction and sentence, the Appellant filed this appeal and raised the following grounds namely;
 - i. That the prosecution failed to prove it's case against him.
 - ii. That the trial court fell into error by convicting him based on hearsay.
 - iii. That the trial court erred by not taking into consideration the first report at the Police Station indicating that the attackers were unknown.
 - iv. That the scene of crime was not proved beyond reasonable doubt.



- v. That the trial court erred by convicting the Appellant based on its part that his brother was convicted of the same offence.
 - vi. That the prosecution's case did not warrant conviction.
 - vii. That the trial court erred by ignoring his defence.
 - viii. That the trial court erred by shifting the burden of proof to him.
 - ix. That the sentence meted out on him was manifestly excessive.
26. The Appellant filed written submissions dated 11th September 2022 but later expressly told this court that he was abandoning the submissions and rely on the submissions dated 13th July 2023 and submissions in rebuttal filed on 3rd October 2023.
 27. In his lengthy submissions dated 13th July 2023, the Appellant submits that the incident occurred at night and the lights at the scene were not favourable to positive identification. He claims that he was arrested and charged based on suspicion which he contends cannot sustain a charge of robbery with violence.
 28. He contends that the investigations carried out was shoddy contending that if the same was done properly he could have been exonerated insisting that he was not at the scene of the incident at the material time. He faults the trial court for not taking his defence into account. He contends that his defence of alibi was never considered.
 29. He claims that he was detained at the Police Station beyond the constitutionally prescribed time submitting that his rights were violated as a result. This however is a new additional ground raised at submissions stage without leave of this court. In any event if the issue of constitutional violations regarding his arraignment were to be raised, this forum is certainly not the right forum because he can as he has the option to file a separate cause outside this appeal and ventilate the same. This court as the appellate court concerns itself with the evidence tendered during trial and whether the evidence was sufficient to sustain a conviction.
 30. He also raised an issue of legal representation but that is also a new ground and an afterthought. The Appellant in this appeal also requested for a pro bono advocate and when this court directed that one be appointed, the advocate (Mr. Kilonzi advocate) was duly appointed but when the matter came up for submissions, the appellant changed his mind and said he wanted to act for himself and did not need legal representation. His allegations that he was prejudiced during trial because of lack of representation is therefore an afterthought and belated.
 31. Another new ground raised is that the charge sheet was defective for citing both Sections 295 and 296 (2) of the *Penal Code*. The ground was raised as an additional ground but the Appellant never sought leave of this court as provided under Section 350 (2) of the *Criminal Procedure Code*. This court nevertheless finds that even if the ground had been raised properly, this court could not have found merit in it because the charge sheet clearly spelt out the nature of the offence and the particulars were clearly spelt out to enable the appellant understand what he was being charged with and what to plead to. He was not prejudiced because the charge sheet complied with provisions of Section 134 of the *Criminal Procedure Code*.
 32. The Appellant submits that the prosecution's case was not proved the required standard pointing out that the identification parade was not conducted in accordance with the law. He submits that the conditions obtaining at the scene of the crime were not conducive to positive identification. He urges



- this court to find that it was not save to render a conviction in such a serious crime based on flawed process of identification.
33. The appellant finally submits that the sentence handed over to him was excessive submitting that he did not deserve the death penalty.
 34. The State has opposed this appeal vide written submissions dated 15th September 2023 done by M/s Pauline Mwaniki the Principal Counsel from the Office of Director of Public Prosecution. She contends that the prosecution proved it's case pointing out that all the necessary ingredients were proved citing the provisions of Section 296 (2) that specify the ingredients of the offence.
 35. The State contends that the evidence showed that the robbers were armed with a panga and metal bar. The State points out that the victim was cut and her hand broken during the robbery adding that dangerous weapons were used.
 36. It submits that the robbers were more than one and that two attacked the complainant while the other two kept watch.
 37. The Respondent submits that actual violence was visited upon the complainant and relies on medical evidence tendered. It also points out that a broken stool was tendered as an exhibit which in it's view was indicative of violence used contending that the complainant was lucky to be alive after the vicious attack.
 38. The State contends that the evidence tendered at the trial positively linked the Appellant with the offence. It is submitted that the Appellant was present at the scene and aided his accomplices adding that there was a common intention to execute the robbery.
 39. The State submits that the Appellant's defence of alibi was considered and found to be an afterthought adding that PW 2 displaced his alibi.
 40. This court has considered this appeal, the grounds raised and the response made by the State. This court has already considered some of the grounds above.
 41. This is a first appellate court and the role of this court is to re-evaluate the evidence tendered and arrive at own conclusion. The Appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal*. It is evident that the charge sheet cited both Sections 295 and 296 (2) which was erroneous because Section 296 (2) was sufficient in terms of description of the offence and sanction. That error was however insignificant and curable under Section 382 of the *Criminal Procedure Code* because it did not cause prejudice to the Appellant. He understood clearly what he was being arraigned for.
 42. Section 295 provides as follows;

“ Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it's being stolen or retained, is guilty of the felony termed robbery,” Section 296 (1) provides that anyone found guilty of robbery is liable to fourteen (14) years imprisonment.
 43. Section 296 (2) proves as follows;

“ If the offender is armed with any dangerous weapon or offensive weapon or instrument or is in company of one or more other person or persons, or if, at or immediately before or 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.”

44. It is therefore evident that the prosecution had no need to cite the two provisions because the two sections are duplicators but as observed above, this court finds that the Appellant was not prejudiced in any way. Suffices to state that under Section 296 (2) the elements necessary to establish the offence are;
- i. That the offender is armed with any dangerous or offensive weapon or instrument or
 - ii. The offender is in the company of one or two persons or
 - iii. Establish use of violence on the victim immediately before or after the time of robbery. Establishment of any of the above ingredient is sufficient to sustain a conviction.
45. This court has evaluated the evidence tendered during trial and finds that the prosecution’s case established that the complainant (PW 1) was robbed and during the time of robbery serious injuries were inflicted on her. I have looked at the evidence of the complainant (PW 1).
46. I find that her evidence was well corroborated by her niece (PW6 – Rose Kyalo) the only witness who was present during the incident. The other prosecution witnesses described the state of affairs they found when they rushed to rescue PW 1. There is no doubt that the complainant was robbed and seriously injured during the robbery. The evidence of the Medical Officer (PW 7) and in particular in respect to the P3 form (P exhibit 7) she tendered shows the serious nature of the injuries suffered. I never the less find that PW 7 never laid basis to tender the other medical documents like the discharge summary from Mutomo or the medical chits from PCEA Kikuyu Hospital. Those exhibits tendered from Mutomo Sub-county and PCEA Hospital were therefore not useful the Prosecution’s case because hearsay rule but the P3 form (P exhibit 7) was properly tendered by PW 7 and the same indicated that the complainant indeed suffered serious injuries. The evidence of PW 1 and the other prosecution’s witnesses regarding the injuries suffered by the complainant was well corroborated by the P3 form.
47. The Appellant has taken an issue with the initial report made at the Police Station which was to the effect that the robbers were unidentified but I have looked at the evidence tendered in that respect and find that the trial court evaluated the evidence correctly and correctly found that the person who reported the incident was Rose Kyalo (PW 6) who made the report when the complainant was still admitted at the hospital undergoing treatment. In her testimony during trial, PW6 was consistent in that respect. She did not recognize the robbers. She took off when PW 1 screamed for help hid in a shamba and made the crucial call to the complainant’s Son (PW 4 – Joshua Kaloki) who mobilized his friends and rushed to the scene using motor bikes. The evidence of PW 1 and PW 6 clearly indicated that there were more than one assailant.
48. I agree with the State that the evidence tendered by the prosecution positively linked the Appellant to the offense of robbery with violence. Joseph Kamotho Kisuli (PW 2) stated that the Appellant was his Uncle and called him at the material time and upon request dropped him and three of his accomplices at a site near the compound of the complainant. The testimonies of PW 1 and PW 2 were consistent and linked the Appellant with the offence. The complainant says he had employed him and Paul Kyalo in the construction of the very house that was the scene of crime. The lighting at the scene was sufficient for positive identification as narrated by PW1 and corroborated by the Investigating Officer (PW 8) who visited the scene after the incident. PW 1 was firm in her testimony that she recognized the Appellant and another assailant named Paul Kyalo. In my considered view, there was very little value the prosecution or the police added to their case by conducting identification parade. An identification parade is only conducted where the victim does not know the assailant but when



the complainant knows the assailant's identification parade is of no probative value. In any event, the person who conducts the parade and authors the result of the parade was not called to testify and the investigation officer laid no basis to tender the evidence on identification parade. I would have found that the evidence of identification parade breached the provisions of Section 33 of *Evidence Act* but in view of the fact that the evidence was of no value to the prosecution for the aforesaid reasons, the finding is purely academic. The results of identification parade was of no use to the prosecution in law and certainly it is of no use either to the Appellant.

49. The evidence of PW 1 and PW 2 was sufficient to positively link the appellant with the offence. I also agree with the Respondent that though there was no proof that the Appellant actually attacked the complainant, the evidence tendered showed that he actively participated in the robbery. He called a boda boda (PW 2) and asked him to ferry them to the scene of crime and paid Kshs. 200/= while his accomplice paid the balance of Kshs. 200/=. PW 2 was a close relative of the Appellant and there is no evidence or even a claim by the Appellant that he harboured any ill feelings towards him to testify falsely against him. His evidence was both credible and reliable.
50. The complainant stated in court that she clearly saw the Appellant trying to hide his face using a pole and was clear on who she saw. She even recalled what the Appellant wore at the time. The complainant stated that she has six security lights in the compound which aided positive identification.
51. Furthermore, the Appellant has conceded that he complainant knew him well since childhood. He did not deny the evidence of PW2 that he was his Uncle. His contention that the trial court relied on hearsay hold no water in my considered view.
52. The Appellant's defence of alibi was given due consideration by the trial court contrary to this assertion. He says his wife eloped with another man but he could have availed his father-in law if he was sincere on his alibi. He also claims he was in Church on the material day but he also never availed any of the Church members to confirm that he was busy with religious activities on the material day.
53. This court finds that the prosecution's case on the element of violence was well established at the trial. The dangerous weapons used by the robbers were tendered in evidence. The metallic bar used to hit the complainant on the hand and fractured it in the process was tendered as P exhibit 10. The stool that is usually used as a furniture was turned into a dangerous instrument when it was used to hit the complainant. The broken stool was tendered as P exhibit 8. This court is satisfied that based on the evidence tendered, the prosecution's case was overwhelming against the Appellant. The conviction was safe and the trial court evaluated the evidence placed before him well and reached the correct verdict by finding a conviction.
54. On sentence, I find that the trial court found that there were mitigating circumstances to be considered but found that its hand were tied by statute. That however was a bit erroneous in view of the emerging jurisprudence that the discretion of the trial court should not be fettered by a statute. It is only on that basis that I find that the death penalty though lawful was a bit harsh and excessive.
55. In the premises, the conviction is upheld but the death sentence is set aside. In its place the Appellant is hereby sentenced to serve thirty-five (35) in jail to run from the date he was arraigned (16th July 2019) as he was in custody throughout his trial. He has fourteen (14) days Right of Appeal.

DELIVERED, DATED AND SIGNED AT KITUI THIS 12TH DAY OF FEBRUARY, 2024.

HON. JUSTICE R. LIMO - JUDGE

