



REPUBLIC OF KENYA



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**Samande & 2 others v Republic (Criminal Appeal E013 of 2022)
[2025] KECA 1486 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1486 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL E013 OF 2022
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
SEPTEMBER 19, 2025**

BETWEEN

JOSEPH KAMAU SAMANDE 1ST APPELLANT

JOSEPH MANYINGE KIARIE 2ND APPELLANT

STANSLAUS KITONGA MUSEMBI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Narok (J.M. Bwonwonga, J.) dated 11th July 2019 HCCRA No. 91A, 91B & 91C of 2017)

JUDGMENT

1. The appellants, Joseph Kamau Samande, Joseph Manyinge Kiarie & Stanslaus Kitonga Musembi faced two counts of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of count I were that on 15th May 2012 at Katakala area Narok South District within Rift Valley province, the appellants, jointly with Kevin Muchiri Kariuki and others not before the court, while armed with dangerous weapons namely a pistol and a hummer, robbed Geoffrey Koskei off a motor vehicle registration number KBK 025V, make Toyota Shark valued at Kshs. 1,000,000.00 and two mobile phones make Nokia, valued at Kshs. 6,000.00, all valued at Kshs. 1,006,000.00, and during the time of such robbery, used personal violence on the said Geoffrey Koskei.
2. The particulars of count II were that on 15th May 2012 at Katakala area Narok South District within Rift Valley province, the appellants, jointly with Kevin Muchiri Kariuki and others not before the court, while armed with dangerous weapons namely a pistol and a hummer, robbed Samuel Kibet a mobile phone Nokia 1200, and a pair of shoes, all valued at Kshs. 5,000.00, and during the time of such robbery, used actual violence to the said Samuel Kibet.



3. The appellants were arraigned before the trial court in Naivasha CMCR No. 3689 of 2012. They pleaded not guilty to the two counts. After a full trial, the appellants were convicted on both counts and sentenced to death. Aggrieved by that decision, the appellants appealed before the Narok High Court in HCCRA No. 91A, 91B and 91C of 2017. In his decision dated 11th July 2019, Bwonwonga, J. found that the appeal was unmerited. It was dismissed both on conviction and sentence.
4. The appellants are dissatisfied with those findings hence this appeal. They filed separate notices of appeal dated 9th March 2022. They jointly thereafter filed supplementary grounds of appeal dated 17th April 2025 and 12th May 2025. Additionally, the 1st appellant filed undated grounds of appeal. In summary, the appellants raised the following grounds impugning the findings of the High Court: that the ingredients to the offence of robbery with violence were not proved beyond reasonable doubt; the appellants were not positively identified as the perpetrators; the evidence was circumstantial and failed to sustain a conviction; the learned judge was biased; the 1st appellant has undergone psychological stress coupled with negative peer pressure; their alibi defences were not considered; and that the death sentence was declared unconstitutional. For those reasons, the appellants prayed that their appeal be allowed, their convictions be quashed and their sentences be set aside.
5. The appeal was canvassed by way of written submissions on 13th May 2025. The appellants were present and represented by learned counsel Mr. Ochieng' while Senior Assistant Director of Public Prosecution Mr. Omutelema represented the respondent. Parties orally highlighted their respective written submissions in a bid to persuade this Court to find in their favor.
6. The appellants filed written submissions dated 12th May 2025 together with a list of authorities and a case digest both dated 17th April 2025. The 1st appellant also filed his undated written submissions. Condensing the submissions of the appellants, they submitted that the ingredients for the offence of robbery with violence were not proved to the required standard. They argued that the money purported to have been stolen was not shown to have been found at the scene of the crime. In their view, they concluded that PW1 and PW2 were not robbed off any money.
7. The appellants submitted that the evidence adduced amounted to the offence of gang rape and not robbery with violence. They argued that the evidence of PW3 and PW4 only proved the offence of gang rape with the assailant being the 2nd appellant. In any event, PW1 and PW2's evidence was too circumstantial to sustain a conviction. Furthermore, it was not established that they were found in possession of the stolen items.
8. Turning to the identity of the perpetrators, the appellants submitted that PW1 and PW2, the eye witnesses to the crime, failed to establish that they were the offenders because of the circumstances that occurred during the offence which took place at night. That their names were not submitted to the police when the offence was recorded at the occurrence book. Lastly on the sentence, the appellants submitted that the 1st appellant had since obtained several certificates from different courses and had reformed. They urged this Court to reconsider the sentence.
9. The respondent opposed the appeal. It filed written submissions, a case digest and a list of authorities all dated 6th May 2025 to submit that the conviction was safe. This is because PW1 and PW3 positively and without any mistake, identified the appellants as the perpetrators of the offence. It gathered from the testimonies of these two witnesses that the offence occurred during the day and engaged the appellants considerably as the offence was taking place.
10. While observing that PW1 gave unsworn testimony, the respondent credited his evidence observing that he underwent a rigorous cross examination exercise. As such, the conviction based on PW1's



testimony indeed sustained a conviction. Furthermore, his evidence was corroborated by that of PW3, whose evidence was corroborated by that of PW4.

11. Addressing their defences, the respondent submitted that they were considered and rightly rejected as they did not dislodge the prosecution evidence. Finally, on their sentences, the respondent submitted that aggravating circumstances were considered in meting out their sentences against their pleas in mitigation. In addition, it urged this Court not to interfere with the findings on sentence in light of the decision of the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR). It prayed that the appeal be found to be without merit and be dismissed in its entirety.
12. Our obligations as a second appellate Court were elaborated in the case of *M’Riungu vs. Republic* [1983] KLR 455 as follows:

“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the same conclusion, which would be the same as holding the decision is bad in law.”
13. According to the facts captured in the record before us, PW1 Geoffrey Kimngetich Kosgey testified that he was a matatu driver employed by PW2 Samuel Kosgey over motor vehicle registration number KBK 025V. On 15th May 2012 at 7:50 a.m., PW1 was at a garage in Kericho when he was called by his conductor Samuel Kibet PW3. He was informed that a customer called Musembi, identified as the 3rd appellant, wanted to hire the matatu to Narok-Ngareta. PW1 advised PW3 to come with the customer, and his lady friend, to the carwash where the vehicle was being washed.
14. Upon agreeing on the terms of service, PW1 informed PW2 about the job offer. They embarked on their journey. PW1 sat with the 3rd appellant in the front part of the vehicle while the lady sat with his conductor at its rear. The journey commenced at 8:30 a.m. On reaching Kaplong, PW1 was called by PW2 who asked him to pick up passengers. However, the 3rd appellant was not agreeable. He told PW1 that they were supposed to pick some teachers on the way.
15. On reaching Lulunga, the lady alighted while PW3 bought water. They then all proceeded to a murrum road. After traveling for a distance, at around 1:00 p.m., PW1 saw four people from a distance. The 3rd appellant asked him to turn. In the process of doing so, the 1st and 2nd appellants approached him. The 1st appellant then inquired from the 3rd appellant why they had delayed. In quick succession, the 1st appellant slapped PW1 while the 3rd appellant pulled him to his side, informing him that his journey had come to an end. The 1st appellant then snatched the car keys from PW1 after switching off the vehicle. The 2nd appellant also slapped PW1 incessantly.
16. PW1 attempted to run away but was caught by the 3rd appellant. He was then sandwiched between the 2nd and 3rd appellants in the rear part of the vehicle. The 2nd appellant then stepped on him while PW3 was accosted by the other assailants. PW1 was then hand tied on his back. He was forced by the 2nd appellant to ingest a bitter drink from a Dasani bottle or else he would have been stabbed with a knife. PW1 recalled that they were in a struggle with the assailants that lasted for approximately 30 minutes.
17. The 1st appellant then drove the motor vehicle. After taking the solution, PW1 fell asleep. He then felt the assailants remove his shoes. He would later wake up the following day at Narok District Hospital. He thereafter reported the incident at Narok Police Station. PW1 identified the following



items reported to have been stolen: the vehicle, his shoes, his red cap, his grey jumper, PW3's black leather belt, his P3 form and the Dasani water bottle. He also testified that his Nokia mobile phone worth Kshs. 2,800.00 was never recovered.

18. PW2 Samuel Kipsiele testified that he was the owner of motor vehicle registration number KBK 025V matatu. He added that he had employed PW1 as its driver while PW3 Samuel Kibet alias Kipeles was his conductor. He recalled that on 15th May 2012, PW1 informed him that they had received business to transport some teachers from Narok to Kericho. PW2 agreed to the arrangement but asked him to keep in touch every thirty minutes as he was off route.
19. At around 2:00 p.m., PW1 was out of reach raising suspicion.
This prompted PW2 to alert police officers to establish the whereabouts of his employees as well as the vehicle. At 4:00 p.m., PW2 was informed by police officers that his motor vehicle had been traced with three occupants. PW2 arrived at the Narok Police Station, where the vehicle had been parked and positively identified it as belonging to him. He was then shown two suspects identified as the 1st and 2nd appellants, while the 3rd appellant was seen being interrogated by police officers.
20. PW2 then traced PW1 who was unconscious. He had no jumper, shoes or his red cap. He took PW1 to Narok District Hospital where he was treated. He also established that PW3 had been taken to the hospital. He identified the vehicle as his.
21. PW3 Samuel Kibet Melly, conductor of motor vehicle registration number KBK 025 matatu, testified that he was hired by PW2 and worked together with PW1. He testified that on 15th May 2012, he was at the Kericho stage when he was approached by the 3rd appellant and his lady friend. They informed him that they were looking to hire a vehicle to collect some teachers for a seminar from Narok to Kericho. After speaking with them, PW3 took them to PW1 who was with the car.
22. After the car had been cleaned, PW1, PW3, the 3rd appellant and the lady friend, identified as Ciru, all proceeded to the school. At the Ngatagara junction, PW3 alighted to buy water. They left Ciru there while the rest continued with the journey. He recalled that the road they used was not tarmacked and wet. They proceeded for some time until they met four people on the way who would later turn to be their assailants. The 3rd appellant asked them to stop since the teachers were leaving.
23. The 1st appellant then told the 3rd appellant that he would not go to the seminar since elephants had destroyed crops and he wanted to help chase them. PW3 thus opened to usher them into the vehicle. Suddenly, the 1st appellant slapped PW1 while the 3rd appellant pulled him away from the driver seat. PW3 recalled being hit by one of the assailants who told him that his journey had come to an end. The 2nd appellant had a knife while the 3rd appellant conducted a search on him for his own goods and slapped PW3. He then stole Kshs. 3,500 from him.
24. During the scuffle, PW3 engaged with the 3rd appellant who took the bottle of water that PW3 had and put some chemical inside it. He was asked to drink the substance all the while being assaulted by the assailants. Before going unconscious, PW3's shoes were removed. He recalled that the assailants also put his socks into his mouth while his shirt was torn. He was then tied with a sisal rope. Fearing for his life, PW3 cooperated with the offenders and complied with all orders that they had issued. The 1st appellant drove the vehicle.
25. The following day, PW3 found himself in a hospital together with PW1. He also saw that the 1st and 2nd appellants in hospital with blood stains. He recalled that the 2nd appellant was wearing a hat. He identified his Nokia 1200 mobile phone that was recovered, the vehicle, his black leather shoes,



PW1's shoes and hat, the 2nd appellant's blue hat, a hummer, Masai rungu, rope with blood stains, rope without blood stains, his P3 form and Dasani water bottle.

26. PW4 David Ratia testified that on 15th May 2012, at around 5:00 p.m., his wife informed him that a matatu had dumped two people in their homestead and left. After taking their cattle to the shed, PW4 found one man who looked drunk, had mucus around his mouth and nose, white foam around his mouth and was not talking. He was wearing a conductor's uniform. Afraid, PW4 informed his neighbour and called the area chief. They took him to the Narok Police Station. On return, they found another man in the maize farm. He had no shirt or shoes but was wearing a trouser. He was also not talking. He was collected by PW2 together with the police. He later on learnt that the two persons were victims of a crime.
27. PW5 Sergeant Richard Kurgat received intelligence reports on 15th May 2012 that a vehicle had been stolen and was enroute to Mai Mahiu. The vehicle was spotted 80 metres away from them where they had placed a road block. The driver of the vehicle saw the road block and diverted to a feeder road on the right side. The vehicle was chased by PW5 with his colleagues as well as area residents. In a twist of fate, the vehicle got stuck in a muddy swamp.
28. The occupants then alighted from the vehicle in the hoping to run away. Two of the suspects were arrested while the other suspect fled but was arrested at Orolobin. He recalled that the 1st appellant had been arrested and assaulted by members of the public. He rescued him and escorted him to the police station. The 1st appellant was however not found in possession of stolen goods. He identified the vehicle as that which was reported stolen.
29. PW6 CPL Paul Kiilu received reports that a vehicle had been stolen. On recovery of the vehicle, PW6 proceeded to the crime scene with his colleagues. The vehicle was then taken to Duka Moja Police Post. Their role was to take photographs of the stolen vehicle that were produced in evidence.
30. PW7 PC Zandok Wafula the investigating officer was summoned by their DCIO and informed that a vehicle had been reported to have been stolen. He then called PW5 and informed him about the offence. He was later informed by PW5 that the vehicle had been recovered. They also arrested the 1st and 2nd appellants as well as the 3rd accused person who had since passed on. The suspects were escorted to Duka Moja Police Post. PW7 interrogated witnesses, recorded their statements and preserved the evidence that he produced during his testimony. Later, the 3rd appellant was lured into arrest with the help of the 1st and 2nd appellants. He then preferred the charges against the appellants.
31. PW8 Jessie Kimonjino, a clinical officer at Narok District Hospital, testified that PW1 was brought to their facility accompanied by police officers. Given that he was unconscious, he was admitted for observation. Though he was not physically injured, the degree of his injuries was classified as harm. PW1 was put on fluids to dilute and remove the toxins in his body.
32. PW8 also testified that PW3 was brought to their facility. He complained that he had been poisoned. He had no physical injuries but was semi-conscious. It was for this reason that he was admitted at the hospital. He was given intravenous injection to eliminate toxins. His degree of injury was classified as harm. PW8 filled the P3 forms dated 9th August 2012 of both patients that were produced in evidence.
33. At the close of the prosecution's case, the trial court opined that the prosecution has established a prima facie case against the appellants. They were placed on their defence. DW1, the 1st appellant testified that on 15th May 2012 he was working as a charcoal dealer at Suswa trading centre. In the process, a dispute arose with one of the vendors. The appellant started fighting him calling for the presence of the area chief to neutralize the fight. The area chief, on arrival, accused DW1 of burning charcoal



and had him arrested by police officers. The 1st appellant testified that he was taken to Narok Police Station but booked on 16th May 2012. Later, he was informed that he needed medical attention. He was later summoned before the trial court on 17th May 2012 to answer to the charges that he denied. His testimony was unsworn.

34. DW2, the 2nd appellant also gave an unsworn testimony. His evidence was that on 15th May 2012, he was working at his cereal shop located in Narikiangare centre. Later on, he proceeded to a farm where he quarreled with one Kimiru. According to DW2, the parties never resolved the problem and instead, the said Kimiru had the 2nd appellant arrested by police officers on account of the land dispute. At 5:00 p.m., DW2 was escorted at Narok Police Station. He was then arraigned in court on 17th May 2012 and charged with the offence of robbery with violence. He denied committing the offence.
35. DW3, the 3rd appellant's sworn testimony was that he was the proprietor of Kuseura workshop, a mechanic workshop. His job description involved repairing automobiles and general fabrication. His alibi defence was that he slept at Royal Guest House in Machakos (receipt produced in evidence) on 14th May 2012 and on 15th May 2012, he had traveled up country to visit his ailing parents. He was arrested on 16th May 2012 and was not found in possession of stolen items. He was later arraigned in court on 17th May 2012 where he denied committing the offence that he was charged with. He was also charged in other courts and different particulars for the offence of robbery with violence. He recalled this case being televised in the local news upon his arrest.
36. Under section 296 (2) of the Penal Code, robbery with violence is committed in any of the following circumstances: the offender is armed with any dangerous or offensive weapon or instrument; or the offender is in company of one or more other person or persons; or 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. In Paul Katana Njuguna vs. Republic [2016] KECA 207 (KLR) this

Court held as follows:

- “ 18. In Johana Ndung'u -vs- Republic [Criminal Appeal No. 116 of 1995] UR, we succinctly set out the ingredients of the offence of robbery with violence as opposed to that of simple robbery. We stated, inter alia, that in considering the offence under Section 296(2) of the Penal Code, it was necessary to have regard to the definition of the offence of robbery as contained in Section 295. We stated:

“In order to appreciate properly as to what acts constitute an offence under Section 296 (2), one must consider the subsection in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the aforescribed ingredients constituting robbery are pre-supplied in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or



2. If he is in company with one or more other person or persons, or
3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”
(Underlining ours).”

37. Gathered from the evidence at trial, PW1 and PW3 were the victims of the offence. According to their corroborating evidence, PW3 was approached by the 3rd appellant and Ciru as customers in need of transporting teachers in a seminar to Narok Ngareta. PW3 alerted PW1, the driver of motor vehicle registration number KBK 025V matatu. They all proceeded to meet PW1 who notified his employer and owner of the suit vehicle, PW2, about what had transpired.
38. PW1 sat with the 3rd appellant at the front while PW3 sat with Ciru on the rear of the motor vehicle. On reaching Lulunga, the lady alighted while PW3 bought water. They then all proceeded to a murram road. After traveling for a distance, at around 1:00 p.m., PW1 and PW3 saw four people from a distance who turned out to be their assailants.
39. The 3rd appellant asked PW1 to turn. In the process of doing so, the 1st and 2nd appellants approached him. The 1st appellant then inquired from the 3rd appellant why they had delayed. In quick succession, the 1st appellant slapped PW1 while the 3rd appellant pulled him to his side, informing him that his journey had come to an end. The 1st appellant then snatched the car keys from PW1 after switching off the vehicle. The 2nd appellant also slapped PW1 incessantly. PW3 was also beaten and had his cash and mobile phone stolen during the ordeal.
40. According to PW1 and PW3, the ordeal lasted about 30 minutes. At some point, the 2nd appellant stepped on PW1 while PW3 was accosted and assaulted by the others. They were thereafter tied with a sisal rope. They were then forced to drink a chemical substance that was placed in the water bottle that PW3 had purchased earlier. They were threatened with stabbing if they did not comply.
41. The 1st appellant then drove the motor vehicle. After taking the solution, PW1 and PW3 fell unconscious. Before he fell unconscious, PW1 heard the assailants remove his shoes. PW3 also had his shoes removed and his socks placed in his mouth. They would later wake up the following day at Narok District Hospital. Thereafter, the incident was reported at Narok Police Station.
42. PW2 on his part became suspicious because PW1 was at some point untraceable. He elected to report at the police station that the vehicle and his driver were missing. This prompted PW7 to alert PW5 on suspicion that the vehicle had been stolen. The vehicle was recovered by PW5. In hot pursuit of the assailants, PW5 managed to arrest the 1st and 2nd appellants. The 1st appellant had been assaulted by members of the public. The 3rd appellant was later lured into an arrest with the help of his co-accused persons.
43. It is apparent that from the evidence of the witnesses, the offence occurred during the day. The 3rd appellant, was in the company of PW1 and PW3 since their interactions at 8:00 a.m. until 1:00 p.m. when he turned on them. The 1st and 2nd appellants assaulted and harassed the victims for thirty minutes. The appellants were arrested shortly after the incident took place. We find that as rightly stated by the two courts below, the circumstances were conducive enough for positive identification of the perpetrators. Certainly, there was no case of mistaken identity. We find that indeed the appellants



drugged the victims in order to get away with the offence. We also find that during the time of the robbery, the appellants wounded and used other personal violence to attack PW1 and PW3.

44. During the arrest, the 1st and 2nd appellants escaped from the vehicle after they attempted to run away from the road block. They were arrested by the members of the public and there is evidence that they were in possession of the stolen motor vehicle that belonged to PW2. PW1 and PW3 positively identified them as the people who had attacked them. Inside the vehicle, PW7 also recovered several items belonging to PW1 and PW3.
45. The totality of the evidence adduced before the trial court proves that the appellants drugged the victims and also beat them using personal violence. The evidence established that the offence of robbery with violence, in line with section 296 (2) of the Penal Code, was proved beyond reasonable doubt since there were three offenders who at time of the robbery, beat and struck the victims as exemplified above herein.
46. The prosecution's witnesses were thoroughly cross examined by the appellants but their evidence remained unshaken. We find that the two courts also considered their defences but were found not to cast doubt on the prosecution evidence. Accordingly, we find that two courts below properly established that the appellants were properly convicted for the two counts of robbery with violence. We shall therefore not disturb those findings.
47. The appellants were sentenced to death by the trial court after it considered their mitigation. Those findings were upheld by the High Court. Section 297 (2) of the Penal Code provides that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. The sentence provided therein is couched in mandatory terms.
48. Furthermore, the Supreme Court of Kenya emphasized in the case of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) that until a challenge to mandatory sentences is taken up before the courts all the way to the Supreme Court, such sentences are lawful and cannot be interfered with. We are therefore unable to interfere with the sentence which, as passed by the trial court, was legal. Accordingly, the appellants' appeal on sentence lacks merit and it is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed



DEPUTY REGISTRAR

