



**Republic v Saidimu (Criminal Case E008 of 2024)
[2025] KEMC 81 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEMC 81 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
CRIMINAL CASE E008 OF 2024
AT SITATI, SPM
APRIL 7, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES SAIDIMU ACCUSED

JUDGMENT

1. In Count I, the accused person denied the capital charge of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on 10th January, 2024 at 2300hours at Veteran Club within Maralal town within Samburu Central Sub-County of Samburu County, he robbed George Mburu Njoroge of cash KSHS 5, 000= and immediately before and immediately after the said robbery used actual violence on the complainant.
2. In Count II, the accused person denied the felony of doing grievous harm contrary to section 234 of the *Penal Code*. The particulars were that on 10th January, 2024 at around 2300hours at Veteran Club in Maralal town within Samburu Central Sub-County of Samburu County he unlawfully did grievous harm to George Mburu Njoroge.
3. The accused person represented himself at the trial after no probono advocate could be allocated the matter while the DPP’s case was prosecuted by Prosecution Counsel M.K. Ndira.

TheDPP’S Case

4. PW1 George Mburu Njoroge told the court that on 10th January, 2024 at 11pm he went to Veterans Club for food only to find the grill section already closed. As he exited the club, he had a phone call coming through prompting him to stand by the entrance to engage the caller. While in the phone conversation , suddenly a man slapped him making Pw1 to turn to look at who that person was. He instantly recognized the man as Saidimu and shouted at the man: “Nini mbaya?” (What is wrong?)



5. He explained that the accused was well seen by him since the accused stood at a distance of 5 metres from the complainant. He added that there were bright street lights and there was a security light affixed to the front side of the building and shone directly downwards giving clear light.
6. PW1 added that the man did not respond with words but with violence forcing PW1 to flee the scene. The suspect picked up a stone and struck PW1 on the back of his head as the complainant fled the scene. This made the complainant to fall into a trench near the market stalls and the fall gave the suspect to catch up with him. When the suspect caught up with PW1, he picked up a plank of wood from the market stall and used it to strike the complainant severally all over the body causing PW1 to lie down motionless. A passer-by called Stephen came by and asked Saidimu why he was attacking PW1 but Stephen was also hit with a stone by the accused person prompting Stephen to flee the scene.
7. The suspect then frisked PW1's pockets and took away Kshs 5, 000- in cash. The robber then demanded his phone which he immediately surrendered. Just then, the suspect's accomplice joined the robber in the criminal transaction. After grabbing the mobile phone, the suspect asked for its PIN but no sooner had he been given the PIN than the phone went off due to low battery charge. In a fit of rage, the suspect smashed the phone on the ground.
8. At that moment, Stephen who had moments earlier been struck with a stone returned with armed police officers whereupon the suspects scattered and vanished to escape arrest by the police. They abandoned the smashed phone at the scene. Stephen picked up the injured complainant to the Samburu County Referral Hospital where he was admitted, treated and afterwards discharged. The smashed TECNO smartphone was also recovered by the police who had responded to the situation. He recorded his witness statement naming the present accused as the prime suspect.
9. In cross-examination, the following came to light: the other suspect was called Joseph; Stephen was the first to respond to the scene but was struck by the accused before the said Stephen fled the scene; the plank of wood and stone used in the assault were not recovered from the scene; there was no light at the market stall area the street lighting was from electricity
10. PW2 Stephen Nginyi Lemakara told the court that on 10th December, 2024 at 11pm he was going about his bodaboda work when he passed by the Veterans Club & Grill when he saw 2 men in a physical tussle. He instantly recognized both men as the complainant and the accused person. PW2 added that there was bright security lighting that was positioned directly at the front of the entrance to the Veterans Club.
11. The witness added that Saidimu (now the accused person) struck George (the complainant) on the head using a stone forcing the complainant to flee the scene but the accused gave chase after him. He added that PW1 sped through the rear entrance of the Veterans Club towards the direction of the market stalls.
12. Seeing the unfolding situation, PW2 went around to the rear side and found PW1 being accosted by the accused person who had pinned him down to the ground. He noticed that the accused was then joined by an accomplice. He sensed danger and sped off aboard his motorcycle to go look for the police. The witness told the court that he located the police on patrol outside Morris Hotel and alerted them of the ongoing assault.
13. Following the alert, the police accompanied PW2 to the market stalls area whereupon the suspects sped off on seeing the approaching rescue team. He added that he assisted the injured man to the Samburu County Referral Hospital.



14. In cross-examination, the following came to light:there was bright security lighting at the entrance of the Veterans Club where the accused person and the complainant were locked in a physical tussle.He affirmed that in his initial statement to the police, he named one Kelanas the assailant and that this name Kelanwas the known alias of the accused person.
15. PW3 Clinical Officer Charles Leparmorijoproduced the discharge summary and the P3 form dated 11012024 for the complainant. He affirmed that the complainant suffered 3 injuries:Cut wound measuring 3cm long and 2cm deep on the scalp;Swollen left eye with haematoma (blood clot);Visual deficit experienced on the left eye amounting to grievous harm;X rays showing no fracture of the head.
16. PW4 SNO. 253518 Police Constable Simon Nxui John testified as the investigating officer. He told the court that the OCS Minuted the case to him on 11012024. He took up the brief and visited the complainant who was admitted in hospital following the infliction of injuries on him by the assailants. PC Nzui later recorded the statements of the witnesses. George Mburu told him that he had gone to Veterans Club for food but found the hotel section closed. He added that as he was leaving, he was accosted by the accused person whom he knew well and that the suspect beat, kicked and stole from him Kshs 5, 000- cash and smashed his phone.
17. The smashed phone was produced by PW4 as P.Ex.5. the complainants' receipt of phone purchase as P.Ex.6 and the investigation dairy as P.Ex.7. he added that the accused person pleaded that he himself was the victim but he disbelieved him since the suspect fled the scene after being recognized by PW1, Edwin Murimi and Stephen Lemakara.
18. In cross-examination, the following came to light:It was the father of PW1 who lodged the complaint on behalf of his son;The complainant named the accused person in his initial statement;The smashed phone was recovered from the scene;There was a CCTV camera at the scene but the I.O. did not retrieve it;The police did not conduct any identification parade since the complainant had recognized and named the offender.
19. At the end of his testimony, the DPP closed their case and the court found that the accused had a case to answer and put him to the defence.

The Defence Case

20. James Saidimu Gave An Unsworn Statement.He denied the charges telling the court that he recalled the events of 12th January, 2024 when he was in Maralal town and was arrested after he presented himself to the police. He surrendered to the police after learning that he was wanted by the police. The police did not give him any reasons for naming him as a wanted criminal but brought him straight to court.
21. According to the officer, no CCTV footage captured him in the crime. He told the court that he tried to speak to the complainant's father for forgiveness but no forgiveness came his way. He closed his defence at that point.
22. The duty of the Court is to determine whether or not the DPP had proved the charges beyond any reasonable doubt on each ingredient of the offences.



Determination

Count I: Robbery With Violence

22. An extensive discussion of the elements of robbery with violence were recently explained in the authority of *Charles Mwai Kimani v Republic*[2022](Kariuki J.) in the following words:

“ 50. The offence of robbery with violence is contained in Sections 295 and 296(2) of the *Penal Code* as follows:

“295. 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 its being stolen or retained, is guilty of the felony termed robbery.

296(2). 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

51. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person”

23. Applying the foregoing test to this case leads the court to make a finding that the DPP had shown that the accused who was in the company of another man called JOSEPH who is still at large while armed with plank of wood struck the complainant on the head and body before taking his Kshs 5, 000- in cash and this amounted to actual violence on the victim. This proved robbery with violence.

24. Relatedly, the court had to address the issue of the identity of the offender. On this issue, the court noted that the evidence by PW1 and PW2 was that of recognition of a person well known to the



witness. That being so, the court found guidance from the case of *George Mbaya Githinji v Republic* [2019] eKLR (Mwongo J.) where the learned Judge had this to state about recognition evidence:

“The Court of Appeal for Eastern Africa in *Abdalla Wendo v Republic* [1953] 20 E.A.C.A 166 held on this issue as follows:

“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

7. The same court in *Roria v Republic* [1967] EA 573, also held that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

8. The courts in Kenya have consistently relied on the English case of *R v Turnbull & Others* [1976] 3 ALL ER 549, which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The Court there said:

“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”



9. Further, the Kenya Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 426 followed this view when it stated:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

25. In the present case, the court is satisfied that the Accused person who was well known to the 2 witnesses was positively recognized by the 2 witnesses under the bright electric lighting by the entrance of Veterans Club where the assault commenced before pursuit into robbery ensued. His defence was bare and unsupported and is rejected as creating no reasonable doubt in the court’s mind. During the encounter, the complainant spoke in Kiswahili to the accused person herein when he asked him:

“Nini mbaya?”(What’s wrong?)

26. When asked this question while being faced directly, the accused person offered no verbal response but more violence.
27. As corroboration of the evidence of recognition, the complainant and his witnesses named the accused person and his brother to the police in their first report. The first report given to a person in authority is relevant and is a strong test to check on the genuineness and truthfulness of the complainant: *Terekali S0 Korongozi & Another v REX* [1952] EA 259 applied as recently as 2021 in *Abel Maina Mburu v Republic*[2021]eKLR where the superior courts held thus:-

“Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made up case. Truth always comes out in the first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultations with others.”

28. In the result, the accused person is found guilty of robbery with violence under section 215 of the *Criminal Procedure Code*. Right of appeal is 14 days.

Count Ii: Grievous Harm

29. Section 234 of the *Penal Code* provides as follows:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”

30. As to what amounts to grievous harm, Section 4 of the *Penal Code* Chapter 63 Laws of Kenya reads as follows:

“grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the



permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

31. The Court of Appeal in the authority of *John Oketch Abongo v Republic* [2000] eKLR (Chunga, C.J., Akiwumi & Owuor, JJ.A.) elaborated the ingredients of grievous harm in the following terms:

"Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the *Penal Code*. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury."

32. In the present case, the complainant suffered cut wound measuring 3cm long and 2cm deep on the scalp; swollen left eye with haematoma (blood clot); visual deficit experienced on the left eye amounting to grievous harm; X rays showing no fracture of the head.
33. In the court's considered view, these amounted to actual bodily harm as opposed to life-threatening injuries or maim as suggested by the clinical officer. There was no ophthalmologist report to confirm the precise degree of injury to the eye and whether or not the eye injury had permanently disfigured the eye or vision acuity.
34. A clinical officer would not be the proper expert to make this assessment for lack of the specialized tools and equipment to conduct detailed exam of the eyes. As opposed to a Clinical Officer who holds a diploma in general Medicine and Surgery, an Ophthalmologist who holds a diploma in Ophthalmology is seized of the necessary expertise for the diagnosis, treatment, surgery and assessment of eye and vision problems both medical and surgically.
35. The court therefore finds as a fact that the accused person inflicted actual bodily harm as opposed to either a maim or grievous harm.
36. The accused person, however, has not been charged with assault occasioning actual bodily harm in this case. The course to be taken will be the one provided for under sections 179 and 191 of the *Criminal Procedure Code*:

" 179.

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Section 191 of the *Criminal Procedure Code* provides that: -

"The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code,



and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179.”

37. The scope of the 2 sections above were discussed in the authority of *Jeremiah Ouma Adongo v Republic* [2021] eKCLR (Aburili J.) held as follows:

“31. Section 179 aforesaid was dealt with by the Court of Appeal in the case of *Rashid Mwinyi Nguisa & Another v Republic* [1997] eKCLR in which it was held:-

“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial... Section 179 of the *Criminal Procedure Code* cannot be in derogation of the appellate powers of the High Court contained in Section 354(3)(a) of the same code.”

32. The same Court in *Kalu v Republic* [2010] 1 KLR observed as follows:-

“With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the *Criminal Procedure Code* which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence.

Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the *Penal Code* for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the *Penal Code* with manslaughter under Section 202 as read with Section 205 of the *Penal Code*.

That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.”

33. The Black’s Law Dictionary 9th Edition page 1186 defines a cognate offence as:

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”



34. In David Mwangi Njoroge v Republic [2015] eKLR it was held that:

“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”

38. In the result, the court enters judgement and conviction against the accused on the lesser and cognate charge of assault occasioning actual bodily harm contrary to section 251 of the *Penal Code*. This offence occurred at the entrance of Veterans Club as a distinct and separate offence before the accused person pursued the complainant to the market stalls where he executed the violent robbery. Right of appeal is 14 days.

DATED, READ AND SIGNED AT MARALAL THIS 7TH DAY OF APRIL, 2025

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

PRESENT

Accused person

DPP Mwongera

Lawrence Court Assistant

