



REPUBLIC OF KENYA



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**Ratemo v Republic (Criminal Appeal 305 of 2019)
[2025] KECA 2303 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2303 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 305 OF 2019
MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA
DECEMBER 19, 2025**

BETWEEN

JOB OTUORI RATEMO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii (Wakiaga & Nagillah, JJ.) dated 25th September, 2015 in HCCRA No. 12 of 2012)

JUDGMENT

1. This is a second appeal arising from the conviction and sentence of Job Otuori (the appellant) with two others, who were charged before the magistrate's trial court with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The particulars of the offence were that on the night of 17th and 18th November, 2011 at Nyansiongo village, Borabu district within Nyamira County, jointly with others not before the court and while armed with pangas and metal bars robbed Mary Kwamboka Nyariki of property valued at Kshs.30,000 and immediately before or immediately after the time of such robbery, used or threatened to use actual violence against the said MKN.
3. In Count II, they were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on the night of 17th and 18th November, 2011 at Borabu District within Nyamira County while armed with pangas and metal bars robbed JIV¹ of a Nokia mobile phone valued at Kshs.3,500/= and immediately before or immediately after the time of such robbery, used or threatened to use actual violence against the said JIV.



4. In count III they were charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. The particulars thereof were that on the same date and time, in Nyasiongo village in Borabu district within Nyamira County intentionally and unlawfully caused their penises to penetrate the vagina of JIV without her consent. In the alternative, the appellants faced a charge of committing an indecent act with an adult contrary to ¹ Initials used to protect her identity as she was also a victim of sexual abuse Section 11A of the said Act particulars of which were that at Nyansiongo village in Borabu District within Nyamira County they unlawfully and indecently assaulted JIV by touching her private parts namely vagina.
5. Upon conclusion of the proceedings, the trial court found all appellants guilty of the offence of robbery with violence, convicted and sentenced them to 30 years imprisonment on count I and II and 20 years imprisonment for count III, IV and V. Being dissatisfied with the decision of the trial court, the appellant appealed to the High Court (Wakiaga, J. and Nagillah, J.), which dismissed it in its entirety.
6. Undeterred, the appellant is now before this court on a second appeal against his conviction. The appellant faults the learned judge for failing to properly and independently re-evaluate the evidence; upholding an identification parade conducted contrary to established procedure; failing to adequately consider the defence case; failing to recognize violations of the appellant's fair trial rights under Article 50(2)(j)(h) of *the Constitution*, including the failure to provide State-funded legal representation; and affirming convictions for gang rape and robbery with violence in the absence of proof beyond reasonable doubt.
7. Briefly, the prosecution case was that on the material day, JIV PW1, was asleep in her employer's house when she felt a panga on her body, before being warned not to scream. The attackers had not covered their faces and had a big bright torch which enabled her to see their faces. They demanded for money and her phone; then locked up her employers' children whose hands they tied, before taking beans, a television set, battery and clothes from the wardrobe. They then raped her in turns before locking her in the room.
8. PW1 stated that the attackers were in the room for 30 minutes and there was sport light throughout and further testified that the 3rd appellant was arrested at Kijauri while packing the television set in the boot of the car and was able to see him at Kijauri AP Post where he admitted the offence.
9. PW2, Mary Kwamboka Nyariki (Mary) JIV's employer corroborated the said evidence and stated that she has electricity in her house and on the material day her house was broken into by the attackers who had torches, pangas and iron bar. They put on the electricity, removed the mattresses and found money under the pillow. She was able to identify them through the use of the electric light. It was her further evidence that the appellant opened her wardrobe and took 11 kgs of sugar, soap, matchbox, nails and cooking oil while the 2nd appellant took items from the box. In court, she was able to identify the items stolen from her house; and further stated that later the 3rd appellant was arrested by the public at Kijauri with the stolen items. On being cross examined, she confirmed having identified two appellants at the parade while Jackline identified one.
10. Nicholas Mongare [Nicholas] the area chief testifying as PW3, told the trial court that on 18th November 2011 he was called and informed that 3rd appellant had been found at Kijauri with the stolen items before escaping. He was later arrested at Kijauri dam. It is the 3rd appellant who gave the names of the 1st and 2nd appellant, the 1st appellant was later arrested by members of community policing. The evidence was corroborated by Geoffrey Nyabuto Mokera, PW4, the Chairman of Community Policing.



11. Sergeant Daniel Barasa (Sgt. Barasa), PW5, confirmed having conducted an identification parade in respect of the appellants herein at Keroka police station where the 1st appellant was identified by Jackline while the 2nd and 3rd appellant were identified by Mary. The appellant did not object to the parade outcome.
12. PW6, Corporal Joseph Chirchir (Cpl Chirchir), recorded statements from JIV and Mary; he confirmed that the attackers had entered Mary's house through the window and robbed them of the items herein. He confirmed re-arresting the said appellant who mentioned the 1st and 3rd appellants, who were subsequently arrested at Keroka.
13. Joel Ongoro [Joel] testifying as PW7, the clinical officer examined the appellant following the alleged assault and classified the injuries as harm. Upon examination, he observed bruising on the appellant's penis. He further examined Jackline and noted bruising on the labia and hymenal area, as well as the presence of sperm. Based on these findings, he concluded that penetration and ejaculation had occurred.
14. Dalmas Ochwanga Okoth, PW8, a resident of Keroka and proprietor of a battery charging shop at Keroka confirmed having received a battery from the 1st and 2nd appellant whom he did not know before. He stated that the 2nd appellant was arrested by the police when he went to collect the said battery
15. Placed on their defence, the 1st appellant denied all charges. The 2nd appellant asserted that he was at home on 19th November 2011 before later travelling to Keroka to buy clothes, where he was subsequently arrested. The 3rd appellant stated that he was not present at the scene and claimed that, while working as a tout in Kijauri, he was attacked and accused of being a thief.
16. In support of the appeal, the appellant assails his identification citing poor lighting conditions, the stressful nature of the incident, and the fact that the perpetrators were unknown to the victims. He maintained that PW1 was the sole identifying witness and that the circumstances in her room could not have supported a positive identification, while PW2 did not identify him. He further challenges the prosecution's case on the basis of the absence of any prior description of the assailants, material inconsistencies in the evidence, lack of proof placing him at the scene of the crime, failure to conduct DNA analysis despite the availability of samples, and the nondisclosure of medical documents. He submitted that these deficiencies rendered his conviction unsafe.
17. It is further contended that no evidence was adduced linking him to his co-accused, and the claim that the third accused led police to him was expressly denied and unsupported. He points out that the perpetrators spoke Ekegusii, a language he does not understand, and that no evidence placed him in Kijauri before the offence. He emphasized that he was arrested at his home, not while fleeing, undermining any inference of involvement.
18. Regarding the identification parade, it is submitted that the same was fundamentally flawed, thereby rendering it unreliable; that PW1 admitted seeing the appellant at Manga Police Station before the Keroka identification parade, contrary to Standing Order 6(iv)(c), rendering the parade unreliable and leaving only a dock identification. The appellant argues that the first appellate Court failed to properly reassess the evidence, resulting in a conviction based on procedurally tainted identification rather than credible proof.
19. On the charge of gang rape, it is contended that it was not proved against him beyond reasonable doubt. The medical evidence relied on by the prosecution was never supplied to the appellant in advance contrary to Article 50[2][j] of *the constitution*.



20. Further, that while rape may sometimes be established without medical evidence, the appellant contends that his constitutional right to a fair trial was breached and that the prosecution neglected crucial forensic evidence. Although spermatozoa samples were collected during his medical examination shortly after arrest, no DNA analysis was conducted, and the medical evidence was only presented weeks later, denying him a timely opportunity to challenge it.
21. As to whether the prosecution proved the charge of robbery with violence beyond a reasonable doubt, it is contended that there is no evidence that the appellant was found with stolen items at the time of his arrest. The only link to the offence is an alleged mention of his name by the third appellant which was disputed, with prosecution witnesses' testimonies remaining uncorroborated.
22. The appellant complains that he was not assigned counsel at the state's expense contrary to Article 50[2] [h] of *the Constitution*. It is submitted that the record indicates that the appellant first appeared before the trial court on 21st November 2011 and requested time to secure legal representation. Despite this, the court proceeded with the expedited hearing on 24th November 2011 without appointing counsel at the State's expense, in violation of his constitutional right under Article 50(2)(h); that remaining in custody prevented him from independently obtaining legal assistance, leaving him unable to effectively cross-examine witnesses or present his defence deficiencies later relied upon by the lower courts to find his defence lacking. It is submitted that this lack of representation continued into the first appeal, which raised complex factual and legal issues, further prejudicing the appellant; that the subsequent appointment of counsel for the second appeal, limited to points of law, cannot remedy the substantial procedural unfairness and infringement of his right to a fair trial.
23. Lastly, the appellant complains that he was not supplied with the documentary evidence the prosecution intended to rely on, which fact the trial court overlooked, and which resulted in the medical evidence being presented as an ambush, undermining the fairness of the trial; and that the 1st appellate Court did not address this omission, thereby contributing to a miscarriage of justice.
24. In rebuttal, the respondent submitted that the appellant's identification was proper. In her evidence, PW1 stated that assailants' faces were uncovered, a bright torch illuminated the room, and the incident lasted over thirty minutes, allowing her to clearly observe the appellant and his co-accused, including their clothing and roles; that her evidence was corroborated by PW2 who stated that her room was electrically lit providing a consistent account of the appellant's actions. Further, that the prolonged, close, and intimate nature of the assault further supported the reliability of their identifications. In support of this argument the respondent refers us to the case of *R v Turnbull (1977) QB 224* where the court held that;

“If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; ...”
25. Regarding the identification parade, the respondent contends that identification parade complied with the Police Force Standing Orders, Ch. 46 para. 6(b), which requires placing a suspect among at least eight similar-looking individuals, and ensuring the process is free from prompting, and properly documenting it. It is contended that the appellant was positively identified, signed the parade certificate, and raised no objection or claim of irregularity at any stage.
26. It is also submitted that both the trial and appellate courts correctly applied the governing legal standards in finding the identification credible, corroborated, and free from error, considering it alongside other direct and circumstantial evidence; that the appellant was later identified in the dock,



and consistent with the decision in *Kilonzo Musau v R* (2014) eKLR; and the prior positive parade identification rendered the subsequent dock identification safe and proper.

27. It is further contended that the elements of the charge of robbery with violence under section 296[2] were proved as it was established that the attackers were armed, acted in a group, and used actual violence. In support of this submission, the respondent draws from the case of *Oluoch v Republic* (1985) KLR, where the Court affirmed that robbery with violence is established where an offender is armed, is in the company of others, or uses personal violence; and the case *Dima Denge Dima & Others v Republic*, Cr. App. No. 300 of 2007 in which the court stated that these elements are disjunctive, and proof of any one is sufficient.
28. On the charge of gang rape, the respondent contended that Section 10 of the *Sexual Offences Act* imposes liability where rape is committed in association with others. PW1 gave a clear and consistent evidence that she was raped in turns by all assailants, including the appellant which account was unchallenged; the medical evidence produced shortly after the incident confirmed trauma, bruising, epithelial cells, and spermatozoa, while the appellant's own P3 form showed bruising on his penis. The respondent therefore contends that both the trial court and the 1st appellate court correctly found that there was penetration, lack of consent, and joint participation.
29. Drawing from the case of *Fappyton Mutuku Ngui v R* (2014) KECA in which the Court reiterated the decision in *Kassim Ali v Republic* Cr. App. No. 84 of 2005 that:

“...the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence”

and in *Chembe v Republic* [2024] KECA 647 (KLR), where it was stated that lack of DNA does not invalidate proof of rape where credible testimony exists, to argue that the failure to Reliance was laid in conduct the DNA analysis did not vitiate the prosecution's case.
30. Regarding the appellant's alleged violations of his rights to a fair trial under Article 50 of *the Constitution* in particular the right to legal representation and advance disclosure of evidence, it is contended that the record demonstrates full compliance with Article 50(2)(g) and (h) as the appellant was informed of his right to counsel; given time to obtain representation; and the trial was adjourned to accommodate his request; that the right to State- funded counsel is not absolute and arises only where an accused cannot afford an advocate and substantial injustice would result, neither of which the appellant established. His active participation, understanding of the proceedings, and effective cross-examination show no prejudice.
31. Regarding disclosure, it is argued that the appellant raised no objection to the production of documents; sought no adjournment; and failed to demonstrate any prejudice arising from alleged non-disclosure. Further, that the record shows that the appellant was informed of the charges, he was present throughout, and fully participated in the trial. Accordingly, no violation of Article 50 occurred.
32. This, being a second appeal, the mandate of this Court limited by Section 361(1) (a) of the Criminal Procedure Code is to consider issues of law as opposed to factual matters that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere. In such appeals, this Court therefore has a duty to pay homage to concurrent findings of fact made by the two courts below, unless such findings are based on no evidence at all or a perversion of the evidence, or unless on the totality of the evidence, no reasonable



tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to interfere. See *Nyale v Republic* (Criminal Appeal 54 of 2021) [2023] KECA 1081

(KLR) (22 September 2023) (Judgment)

33. Having carefully considered the record, the rival submissions and the principles of law relied upon by the respective parties, the single issue that falls for this Court's determination is whether the offence was proved to the required standard.
34. The offence of robbery with violence is provided for under 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 If the offender is armed with any dangerous or offensive weapon or instrument,
(2) or is in company with one or more other person or persons, or if, at or immediately 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.”

35. In *Johana Ndungu v Republic* [1996] KECA 187 (KLR) this Court held as follows:

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.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 afore-described ingredients constituting robbery is presupposed in the three sets of circumstances prescribed in s.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.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery being armed with a dangerous or offensive weapon. No other fact needs to be proved. Thus, if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the Court to so Convict him.



In the same manner in the second set of circumstances if it is shown and accepted by the Court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The Court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances, there is no mention of the offender being armed or being in company with others. The Court is not required to look for the presence of either of these two ingredients. If the Court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (maybe a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

36. From the above, it is clear that 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.
37. It should however be noted that any one of the above elements, if proved, is sufficient to find a conviction. That is to say, the three elements of the offence are to be read disjunctively and not conjunctively. See *Dima Denge Dima and others v Republic* [2013] eKLR
38. The evidence tendered by the prosecution in support of any of the ingredients aforesaid has to be cogent though. In this case, the complainants testified that they were robbed on the night of 17th and 18th November, 2011 in their house by the appellant in the company of others who were armed with pangas and metal rods. In the process, they gang raped JIV. From the complainant's evidence, it is evident that more than one person was involved in the robbery.
39. On the issue of identification, contrary to the appellant's submissions that it was not proper, it is apparent from the judgments of the two courts below that apart from visual identification, the trial court also based the appellants' conviction on the doctrine of recent possession.
40. The guidelines for reaching a conviction on recent possession were succinctly set out by this Court in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic* Criminal Appeal No. 272 of 2005, where it was stated thus,

“....It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”



41. The case of *Kariuki Kibue v Republic*, [2001] KECA 297 (KLR), when dealing with a similar matter where the appellant failed to explain how he came to be in possession of the complainant's leather jacket and jeans trousers shortly after a robbery this Court stated that:

“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of Section 119 of the *Evidence Act*, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property”.

42. In this case, it is undisputed that the complainants were violently robbed and JIV raped on the night of 17th and 18th November, 2011 where various items including mobile phones were stolen from them. The evidence on record shows that the assailants were arrested in possession of some of the stolen goods and they mentioned the appellant and even gave directions to where he was found and arrested. As a consequence, there is no doubt that the appellants were amongst the gang that robbed the complainant on the night of 17th and 18th November, 2011.

43. Further, from our perusal of the record, the High Court properly re-evaluated the evidence, and did not err in its affirmation of the trial court's finding that the identification was safe. The ample time taken in raping PW1 in turns during the robbery, and coupled by the available lighting, was adequate for positive and error-free identification.

44. It is clear therefore that all the ingredients of the offence were established beyond uncertainty, contrary to the submissions of the appellant. The trial court and 1st appellate court were all justified in concluding that the ingredients of the offence were met as such there is no reason(s) to depart from those concurrent findings.

45. Regarding failure to be informed of their right to legal representation, it is contended that the failure by the court to inform the appellant of the right occasioned an unfair trial placing reliance on Article 50 of *the constitution* which provides;

“ 50.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate,

(2) Every accused person has the right to a fair trial, which includes the right of another independent and impartial tribunal or body.

...

h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;



46. In the case of *R v Chengo & 2 Others* (Petition No. 5 of 2015) [2017] KESC (15) (KLR), the Supreme Court stated as follows concerning legal representation;

“We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open-ended. It only becomes available “if substantial injustice would otherwise result”.

47. Similarly, in the case of *David Macharia Njoroge v R*, [2011]

this Court considered the applicability of Article 50 of *the Constitution* and held:

“State-funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is a signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where “substantial injustice” would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided.”

48. From the above analysis it is evident that the appellants did not demonstrate that they met the criteria that would have enabled them to be accorded a counsel at the expense of the State.

49. In his submissions, the appellant contended that the prosecution did not establish the nexus between the appellant and his co accused. However, in the instant appeal the primary eyewitnesses were PW1 and PW2 who testified that they saw the appellants during the attack as they had not concealed their identity. They were subsequently able to identify them during police identification parade. The trial court found their testimonies consistent, credible and formed the basis of their conviction. However, in this appeal, the reliability of the said identification was challenged on grounds that there was no nexus.

50. We refer to Section 21 of the Penal Code, which is succinct that if two or more people form a common intention to carry out an unlawful act, and the offence is committed as a probable consequence of that plan, then all of them are considered to have committed the offence. Criminal liability under joint enterprise requires active participation and foresight of the criminal act. In the case of *Republic v Tabulayenka s/o Kirya & others* [1943] 10 EACA 51, the court stated thus:

“To constitute such a common intention it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so-called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the attack on Mikairi.”

51. In the instant appeal, the complainant was able to identify the appellant. We take note that the complainant had a close encounter with the assailants who took turns to rape her. They also spoke to her before the attack, and after the sexual assault, even though the incident was at night the complainant had a good and sufficient time to see the culprits.



52. The elements of the offense of robbery with violence were proven against the appellant. He was also correctly identified as one of the robbers, given his time spent with the complainant. The first appellate court rightly concluded that the conviction of the appellant was justified and did not overturn it. Ultimately, we find that the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

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L. ACHODE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

