

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. E028 OF 2025**

**FARAH MOHAMED ALI alias BAZENGA.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

**(Being an appeal against the conviction and sentence by Hon.  
T. Mwangi - CM delivered on 27.08.2025 in Garissa CM's Court  
in Criminal Case No. E019 of 2027).**

**JUDGMENT**

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. Particulars were that on 01.01.2025 at around 2040hrs at Frakas bar within Madogo Township, Madogo location in Bangale Sub County within Tana River County, jointly with others not before the court robbed Lukes Mutegi of his smartphone make Tecno Spark 8 valued at Kes. 15,000/- and immediately after the time of such robbery threatened to harm the said Lukes Mutegi with a long knife.
2. The appellant was convicted and sentenced to serve 20 years' imprisonment.
3. Being aggrieved by the conviction and sentence, he lodged an amended petition of appeal dated 17.12.2025 in which he faulted the decision of the trial court on the following grounds: -

- i. That the trial court erred in facts and law by convicting him yet the prosecution did not prove its case beyond any reasonable doubt.**
  - ii. That the trial court erred in facts and law by convicting him while relying on the uncorroborated evidence of a single witness.**
  - iii. That the trial court erred in facts and law by shifting the burden of proof to the appellant.**
  - iv. That the trial court erred in facts and law by not recognising that the section under which he was charged 296(2) was declared unconstitutional as was determined in the case of Ramathan Musa vs AG.**
4. The appeal was canvassed by way of written submissions.
5. The appellant in his submissions dated 17.12.2025 urged that the learned trial court erred by failing to consider adequately or at all the fact that the identification/recognition of the appellant by PW1 was not proper. He wondered why PW1 testified that he knew him and further stated that he's known as Farah alias Bazenga instead of his real name as depicted in his identification card.
6. He argued that an identification parade ought to have been conducted to properly identify the alleged suspects. To that end, while urging that PW1 failed to properly mention his name nor describe his assailants hence improper identification, the

appellant relied on the case of **Alex Wenua Chituna vs Republic [2023] eKLR** where Nairobi Court of Appeal held that:

**‘The most pertinent issue is whether the appellant was properly identified as being one of the men who attacked the deceased and Jelagat on the material night. Notably the evidence of identification at the scene is that of a single witness, Jelagat and this implores us to consider that evidence with utmost care...’**

7. In the same breadth, the appellant contended that the trial court relied on an uncorroborated evidence of a single witness to convict him. He wondered why all the persons mentioned by PW1 to have been in the bar at the time in question were not presented as witnesses in this case. Equally, he decried the fact that the trial magistrate shifted the burden of proof to him noting that this is a criminal case. He contended that according to his evidence, he stated that on the material day, he was at Fracas club Madogo at 8.40 p.m. and therefore, there is a great difference between Tracas bar and Fracas bar as noted in the proceedings.
8. In the end, he urged this court to allow his appeal as the prosecution failed to prove its case against him.
9. The respondent on the other hand filed submissions dated 02.12.2025 thus opposing the appeal on grounds that the prosecution proved its case against the appellant. Reliance was placed on the case of **Johanna Ndungu vs Republic Criminal**

**Appeal No. 116 of 1995** as was quoted with approval in the case of **Justine Masolo Nyakundi vs Republic [2019] KECA 349 (KLR)** where the court set out the ingredients to be proved to sustain a conviction on a charge of this nature:

- 1) Offender must be armed with dangerous or offensive weapon.**
- 2) If he is in company of more than one person.**
- 3) If at or immediately after the time of the robbery, he/she wounds, beats or uses violence to any person;**
- 4) The act of stealing; and**
- 5) Identification.**

10. That the prosecution's case remained cogent and unshaken as the appellant did not cross examine the witnesses and therefore, the evidence remained unchallenged. This court was therefore urged to uphold the finding of the trial court by dismissing the appeal herein.

11. This being a first appeal, the duty of the court is as enunciated in **Okeno vs Republic [1972] EA 132** where it was held that: -

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A.**

**570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”**

12. PW1, Luke Mutege testified that on the 1-10-2024, at 8.40 pm he was at Fracas bar taking beer with friends. While there, they were suddenly attacked by six rowdy men among them the appellant whom he had known since November 2024 as Farah alias Basenga. That the appellant approached him while he was seated, placed a knife on his stomach, demanded his phone a Techno 8 C valued at Kes. 15,000/- which he took away.
13. He stated that the club was well lit by several bulbs, including one above where he was seated, and that he saw and positively identified the appellant and another man called Abdifatah. He said that the group then threw bottles into the counter thus breaking the TV screen and damaged the CCTV. It was his evidence that after the attack, he and other patrons ran away.
14. He stated that he went to Madogo Police Station where he reported the incident and named the person who placed a knife on his neck in this case the appellant whom he also identified in

the dock., That he later returned to the station when the appellant was arrested and recognized him at the OB desk as the person who had placed the knife on him; He stated that no formal identification parade was conducted.

15. On cross-examination he clarified the timing of the attack to be around 8:30–8:40 p.m. and that he was with his wife Fridah Koome and his cousin Kenneth Mutungi during the attack. It was his evidence that his wife, the bar maid and one Kenneth who were present during the attack did not go to the station nor record any statement. On re-examination, he reiterated that the suspect hit the TV screen on the way out after placing the knife on him.
16. PW2, Police Constable No. 123976 Ouma of the Madogo Police Station Anti-Crime Unit stated that on 02.01.2025, he received a report from PW1 that on the 1-1-2025, he was attacked at Fracas Bar and that he did identify two of the attackers as Farah Mohamed (the appellant) and one Abdifatah. He said that he visited Fracas Bar; confirmed that a robbery had taken place; that the TV set in the bar had been broken and beer taken, and that the matter of the broken bar and TV was before Court No. 4 with the present appellant as the sole person charged in that case.
17. He stated that the appellant was arrested by the members of the community policing on 10.01.2025 while Abdifatah remained at large. He told the court that the complainant first reported the incident to the police at about 8:40 p.m. on 01.01.2025 and that an OB entry was made that evening, and that he recorded Luke's

formal witness statement and that of another witness, Polin Mwendwa, on 02.01.2025.

18. He told the court that he did not conduct an identification parade because the complainant already knew the appellant. That the complainant was afraid of the appellant and that when he brought the appellant before the complainant at the police station, the complainant recognised him. He added that he could not comment on the complainant's evidence in court nor on the circumstances of the arrest because neither he nor the complainant were present at the time of arrest. On re-examination, he confirmed that the complainant did recognize and indeed named the perpetrator.
19. DW1, Farah Mohamed Ali, a matatu conductor stated that on 01.01.2025, he was at Trakas (Fracas) Bar from about 2 p.m. ready to celebrate the New Year. He said that drank beer until he became drunk by evening and could not remember what happened that night. That he only got to his senses the following day when he found himself at home on 02.01.2025. He stated that on 10.01.2025, some people went to his home and escorted him to the police station from where he was later taken to court to be informed of the reasons for his arrest. He denied the offence.
20. He claimed that he was separately charged with the offence of house-breaking before Court No. 4 where he was tried, convicted and then sentenced to seven years' imprisonment. He maintained that he was innocent of the offence charged.

21. He told the court on cross-examination that this was the first time he had said he was drunk and could not remember the events of the day in question. He explained that he had not previously been cross-examined on his state of mind. He further stated that he was with their driver now deceased on the material.
22. From the foregoing, I find that the issues for determination by this court are as follows:
  - i. Whether the prosecution proved the elements of the offence of robbery with violence to the required standard.
  - ii. Whether the sentence by the trial court was harsh in the given circumstance.
23. In proving the offence herein, the prosecution was bound to prove that the elements of the offence of robbery with violence were proved to the required standards. In the case of **Stephen Nguli Mulili v Republic [2014] eKLR** the court held that:

**“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP v Woolmington, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa v R [2013] eKLR.”**
24. The appellant was convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code wherein

he was sentenced to 20 years' imprisonment. For avoidance of doubt, I wish to reproduce the entire section 296(2) as follows:

**“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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.**

25. In **Johana Ndungu vs Republic [1996] eKLR**, the Court stated:

**“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 are pre-supposed 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.**

26. The appellant gave a defence that he was drunk and that he did not know what happened. He basically denied involvement. Of importance to note is the fact that the appellant challenged his identification by urging that the same was uncorroborated.
27. It is trite that single witness evidence can suffice but must be accepted only after careful scrutiny of credibility and reliability; the appellate court must thus re-weigh such evidence on first appeal. The court in **Wamunga vs Republic (1989) KLR 424** at page 426 had this to say:

**“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 a conviction.”**

28. From the facts herein, PW1 testified that the appellant was a person well known to him as he used to see him and knew him as Farah Alias Bazenga. Additionally, he stated that at the material time, there was electricity light from several bulbs in the bar and further, that he later identified him at the police OB

desk. The appellant in his defence also admitted that at the time in question, he was indeed at the said bar hence being at the scene of crime in as much as he denied involvement.

29. Therefore, the prosecution having established that the appellant was at the scene of crime, it must go further and prove that he was in company of another or more, were armed with dangerous weapons, used, applied or attempted to use force before or after the robbery and did steal from the complainant.
30. A review of the foregoing clearly shows that, in as much as identification parade was not conducted, the appellant was positively identified as he was known by pw1 before. It was not necessary therefore to conduct an ID parade.
31. However, the key question is whether any robbery took place. Prosecution entirely relied on the evidence of pw1 and pw2 a police officer whose testimony is basically hearsay in so far as the offence of robbery with violence is concern. Therefore, the only evidence remaining is that of pw1. Whereas pw1 alleged that there were more than one attacker (6) and that they were armed with dangerous weapons and applied force when stealing his phone, no eye witness corroborated his testimony.
32. According to pw1, when he was attacked, his wife, one Kenneth and the bar attendant were present. Why were the three not call as witnesses or any other patron who were present? It is trite that, when prosecution withholds critical evidence or witnesses from testifying, a general adverse inference must be drawn against the prosecution that such withheld evidence would have

been adverse to the prosecution had it been tendered. See **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** where the Court stated that:

**“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See **Bukenya & Others v. Uganda [1972] EA 549**). That is, however, not the position here. We find no basis“**

33. Further, in the case of **Peter Ngure v Republic (2014) KECA 405)(KLR)** the court of appeal held that”

**“In our view, the adverse inference can only be made where the evidence tendered by the prosecution is “barely adequate”.**

34. The learned magistrate found that when pw1 was attacked, his wife Fridah and cousin Kenneth fled hence had no opportunity to see the assailants. However, in his cross examination, pw1 stated as follows;

**“I was with my wife during the time of the incident. The other person I was with had gone to the urinal. When you placed a knife on me. My cousin Kenneth Mutungi and my wife Fridah Koome ran away. I clarify that it is when you came for me that is when Fridah and Kenneth ran away towards the urinal and locked the door of the club from outside”**

35. From the above statement, at the alleged point of attack on pw1, Fridah and Kenneth were together with pw1 hence had the opportunity to see the assailant commit the alleged robbery. Corroboration is a key ingredient or component in establishing a criminal offence except under special circumstances that evidence of a single witness can suffice after the court cautions itself of the dangers of such reliance. There was no reason advanced why witnesses who were present were not call. Although the court warned itself and relied on the evidence of pw1, I find his evidence alone inadequate especially when pw1 admits having been at the scene for new year celebration but did not commit any robbery.
36. For the above stated reasons, it is my finding that the appellant has created reasonable doubt that the elements of the alleged robbery were committed and that he participated. Accordingly, the appeal herein is upheld against conviction and the said conviction quashed.

37. Having quashed the conviction, the appeal against the sentence is rendered moot hence set aside automatically. Accordingly, the appellant is set fully unless otherwise lawfully held.

Dated, signed and delivered virtually this 27<sup>th</sup> day of February 2026

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**J. N. ONYIEGO**  
**JUDGE**