



**Wananda & another v Republic (Criminal Appeal E034 of 2021)
[2026] KECA 613 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 613 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E034 OF 2021
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MARCH 13, 2026**

BETWEEN

DAN CHEBUS WANANDA 1ST APPELLANT

MICAH KIBET KISARA ALIAS KOBOLE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Achode, J.) dated 28th November, 2018 and delivered by (S. N. Riech, J.) on 14th December 2018)

JUDGMENT

1. This is a second appeal lodged by Dan Chebus Wananda and Micah Kibet Kisara, the 1st and 2nd appellants respectively. The appeal is against the decision delivered on 4th September 2021 by Achode, J. in Bungoma High Court Criminal Appeal No. 81 of 2017 as consolidated with No. 82 of 2017. The appeal emanated from the judgment of the Chief Magistrate's Court at Kimilili in Criminal Case No. 1104 of 2013 in which the appellants and were charged, tried and convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The appellants also faced a charge of gang rape contrary to section 10 of the *Sexual Offences Act*. They were each sentenced to death on the first count and 20 years for the offence of gang rape but the sentence was held in abeyance since they had been sentenced to suffer death.
2. The appellants' contest on both the conviction and sentence was dismissed by Achode, J. (as she then was), for lack of merit. Dissatisfied with the decision, the appellants are now before this court, faulting the learned judge for failing to note that the offence was not proved to the required standard and for failing to reevaluate the evidence.
3. Briefly, the facts of the prosecution case were that PW1, JCS¹, the widow of the deceased, Kennedy Chepkik Saekwo, was on the material evening in her kitchen cooking with her children while the



- deceased sat outside on a bench. Two men attacked her, struck her with a gun, and assaulted the deceased while demanding for money. The deceased gave them Kshs. 1,000, but they continued beating him while demanding for more money. PW1 then heard gunshots. Thereafter, the assailants led her to the vicinity of River Kamukuywa where she was raped. She later went to her mother-in-law's house, from where a brother-in-law was sent to check on the deceased. He returned to report that he had died. An alarm was raised and villagers subsequently arrived at the scene.
4. PW1 further testified that she positively identified the 1st and 2nd appellants respectively as the assailants, adding that the 1st appellant was a relative of her deceased husband. She stated that she did not identify the 3rd assailant at the scene. PW1 was escorted to Kapsokwony Hospital where she was treated and medically examined for purposes of completing a P3 form. She further identified the 1st and 2nd appellants at an identification parade.
 5. Abraham Sakwa AS, PW2, a minor (initials used to avoid tracing the identity of PW1) aged 12 years and a son of PW1, testified in an unsworn statement that at about 7.00p.m. he saw two men come to their house and assault his parents. He ran out of the house and subsequently heard gunshots. He was unable to identify any of the assailants.
 6. PW3, Kevin Saekwo, a brother of the deceased, testified that on 23rd July 2013 at about 7.30 p.m., his nephew PW2 reported that people had attacked his father. He went outside, heard gunshots, and was sent by his mother to check on the deceased. He found that the deceased had died. He further stated that PW1 later told him she had identified the 1st appellant, who had lived with them for about two years.
 7. PW4, Dan Kiptoo Singari, was stood down after the trial court noted that he was afraid, and his evidence was consequently disregarded.
 8. PW5, Daniel Singor Saekwo, another brother of the deceased, testified that on 23rd July 2013 at about 7.00 p.m., he was informed by PW2 that his father was being beaten. He rushed to the scene and saw two people assaulting the deceased and PW1 but remained at a distance out of fear. He then heard two gunshots, alerted neighbours by phone, and later found that the deceased had died. He added that PW1 later informed him that she had identified the 1st appellant, among the attackers and who was a relative of the deceased.
 9. PW6, Colleta Mukuyu Saekwo, the deceased's mother testified that on 23rd July 2013 at about 7.30 p.m. her grandson reported that people were beating his father. She heard two gunshots shortly thereafter. PW1 later arrived and reported that she had been raped and that she had positively identified the 1st appellant, known as "Kobole," who had previously lived with the family. PW6 sent PW3 to check on the deceased, who returned and confirmed that he had died.
 10. PW7, Chief Inspector Dalma Ongere, the OCS Kapsokwony Police Station, testified that on 31st July 2013 he conducted identification parades at the request of the Divisional criminal investigations officer "DCIO", Mt. Elgon, during which PW1 identified the 1st and 2nd appellants. He produced the parade forms in evidence.
 11. PW8, Edward Simiyu examined PW1 who reported to having been raped by two persons known to her and had injuries on her upper leg. He concluded that PW1 had been raped.
 12. PW9, D.S, a minor, gave an unsworn statement that he met the 1st and 2nd appellants earlier that evening and later heard gunshots from a neighboring homestead before learning that his brother had been killed. As he was not cross-examined, his evidence was disregarded.



13. PW10, Joseph Masinde Barasa stated that on 22nd July 2013 he ferried the 1st appellant to Saboti, where the latter said he was going to visit his uncle.
14. PW11, John Onditi, the Officer Commanding Police Division “OCPD” Mt. Elgon upon receiving a report of a robbery with a fatality at Kaptama visited the scene, arranged for PW1 to be taken to hospital after she reported being raped, and during investigations established that the 3rd assailant had warned the business community of an impending attack. He further stated that telephone records showed the first call to the 3rd assailant was from the 1st appellant who had been implicated by PW1. The 1st and 2nd appellants were subsequently arrested and investigations taken over by the DCIO.
15. Leonard Saekwo Simatwo, PW12 and Sammy Chemengich, PW14 identified the body of the deceased for purposes of post- mortem while PW16, PC Raymond Kirui witnessed the post- mortem in the presence of the deceased’s relatives.
16. PW13, Dr. Achienza Shikunze, conducted the post-mortem and formed the opinion that the cause of death was cardio-pulmonary arrest due to heart and lung injuries from a bullet wound.
17. PW15, Chief Inspector Justus Njeru, the OCS Kaptama, stated that on 23rd July 2013, he received a report of gunshots at Kaptama and rushed to the deceased’s homestead, where he found the deceased dead. PW1 informed him that she had been raped. During the course of recording statements, he obtained their names and caused the appellants to be arrested and later handed them over to the DCIO, Mt. Elgon.
18. PW17, PC Richard Towet visited the scene on 23rd July 2013 and spoke to PW1 who informed him that she had identified two of the assailants. On 24th July 2013, members of the public brought the 3rd assailant, who was alleged to have fled from the scene under suspicious circumstances. He later arrested the 1st and 2nd appellants, recorded witness statements, including from a witness who had escorted the 1st appellant to Kaptama on a motorcycle, and, following an identification parade, caused the appellants to be charged.
19. Placed on their defence, the appellants gave unsworn statements and called no witnesses. The 1st appellant stated that he was arrested after returning from his farm and later met PW1 at an identification parade. The 2nd appellant stated that he was arrested at his place of work, detained pending completion of investigations, and later arraigned in court where he denied the charges.
20. In support of the appeal, the firm of Lore and Company Associates, it is contended that the trial court failed to independently and comprehensively re-evaluate the evidence adduced at the trial, appearing to have formed its mind prior to assessment. In its judgment, the first appellate court characterized the defence’s arguments as “afterthoughts” aimed at exonerating the appellants rather than genuinely challenging the prosecution’s evidence.
21. It is further contended that the first appellate Court also relied heavily on the testimony of PW1 as the sole witness of identification, finding her evidence credible, reliable, and sufficiently detailed to justify conviction yet PW1 failed to positively identify the perpetrators and further that the medical evidence was not conclusive.
22. Relying on the case of *Allen vs. DPP* [2014] 1 EA 122, it is contended that PW1’s evidence lacked such corroboration. Further, the identification parade was arguably unnecessary, given that PW1 purportedly knew the appellants from prior engagements. Also, a possible motive arising from a pre-existing land dispute between the parties undermined PW1’s credibility. The first appellate Court, therefore, failed to properly re-assess these contradictions and the wider context of the case.



23. The appellants contend that the 1st appellate court improperly attempted to fill gaps in PW1's testimony, resulting in a potential shift of the burden of proof against the appellants, contrary to established principles in *Okethi Kale vs. Republic* [1965] EAS 665), where it was stated that appellants with an alibi bear no obligation to prove it. That accordingly, the conviction was unsafe and is for setting aside.
24. In rebuttal, the respondent through learned prosecution counsel Ms. Winny Bati, contends that under section 296(2) of the Penal Code, proof of any one of the elements of robbery with violence of being armed, in the company of others, or using personal violence is sufficient, as affirmed in *Oluoch vs. Republic* [1985] KLR 45. The evidence established that the Appellants were armed, acted in concert, used violence on the victims, and stole property.
25. It is contended that the prosecution's case was further reinforced by medical and forensic evidence, including DNA analysis by PW8, which directly linked the appellants to both the robbery and the sexual assault. The trial court and the first appellate court on first appeal properly evaluated this evidence and found it credible and compelling. The medical and forensic evidence conclusively supported the convictions.
26. It is submitted that the first appellate court did not err in relying on the testimony of a single identifying witness, PW1. The law recognizes that the evidence of a single identifying witness may sustain a conviction where the witness is credible, the conditions of identification are favourable, and the evidence is corroborated. PW1 observed the appellants under sufficient lighting at close range, reported the incident immediately, gave descriptions, and later identified them at a properly conducted identification parade. Her evidence was corroborated by other eyewitnesses and forensic DNA evidence.
27. It is also argued that the Appellants' reliance on alleged contradictions, prior acquaintance, or a purported land dispute does not discredit PW1's testimony; that prior familiarity does not render identification unsafe, as stated in *Patrick Juma Mubweka vs. Republic*, Mombasa Cr. A. No. 255 of 2010, and claims of bias or animosity do not displace credible, corroborated evidence; and that the High first appellate court correctly rejected speculative doubts and evaluated the evidence as a whole.
28. On identification by recognition, including by relatives, it is contended that such evidence may safely support a conviction where the conditions of observation were satisfactory, and the testimony is consistent and corroborated as was held in *David Mwita Wanja & 2 Others vs. Republic* [2007] eKLR. PW1's recognition was direct, immediate, and supported by independent evidence, and the alleged land dispute did not undermine its reliability.
29. Regarding the challenge on the identification parade, it is argued that the parade was conducted in accordance with Police Force Standing Orders, and minor procedural irregularities, if any, do not vitiate a conviction where the witness's evidence is otherwise credible. It is further submitted that first appellate Court properly evaluated the parade evidence in the context of the entire record and the court correctly upheld the convictions.
30. This being a second appeal, this court is restricted under Section 361(1) (a) of the Criminal Procedure Code to considering matters of law only as stated by this Court in *Stephen M'irungi & Another vs. Republic* 1982 – 88 1KAR 360 thus:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no



reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

31. Having considered the record, the grounds of appeal, the submissions of both parties and the Court's mandate, the main issues that falls for determination are whether the ingredients of the offence of robbery with violence were proved beyond reasonable doubt, and whether there was sufficient evidence of identification of the appellants to warrant their conviction.
32. Turning to the first ground of appeal, that is whether the offence of robbery with violence as defined under section 296 (2) of the Penal Code was proved, as stated by both the appellants and the respondent, robbery with violence is committed in any of the following circumstances:
 - i. Where the offender is armed with any dangerous and offensive weapons or instrument; or
 - ii. The offender is in company with one or more person or persons; or
 - iii. 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. See Johana Ndung'u -vs- Republic [2020] KEHC 7093(KLR).
33. It is trite law that the above three elements of the offence are to be read disjunctively and not conjunctively, meaning that even one of the above elements if proved is enough to found a conviction.
34. In her evidence PW1 testified that the robbery was committed by more than one person, and that the persons fatally assaulted the deceased and raped the PW1. PW8, the medical officer who examined and treated the PW1, also testified about the injuries sustained by the her at the time of the robbery. Therefore, the offence of robbery with violence was duly proved by the prosecution and the two courts below did not err in their finding on that issue.
35. Regarding identification, the law on identification is well settled. In Anjononi & Others vs. Republic [1980] eKLR, the Court held that recognition is more satisfactory than mere identification of a stranger, but still demands careful scrutiny.
36. In Wamunga vs. Republic [1989] KLR 424, the Court cautioned that evidence of visual identification, particularly when made under difficult circumstances, must be tested with the greatest care to avoid miscarriage of justice.
37. In the present case, PW1 asserted that she recognized the 1st appellant as Kobole as he was a relative of her deceased husband and that she had lived with him for two years. Further, she was able pick the appellants on the identification parade that was later conducted. Regarding the identification, the learned judge stated that:

"It is clear from the prosecution's case that it largely turns on the alleged identification of the 1st and 2nd accused by PW1 and circumstantial evidence against the 3rd accused. It is trite law that where the prosecution's case rest upon evidence of identification such evidence must be watertight to justify a conviction. I have carefully examined the evidence of PW1 as regards her identification of the 1st and 2nd accused. In cross examination and even in her evidence in chief PW1 was categorical that she never identified the 3rd accused at the scene. She was however firm in her evidence that she positively identified the 1st and 2nd accused. She gave the names and description of the 1st and 2nd accused to not only close relatives but even some of the policemen who talked to her after the incident. It is worth noting that the 1st accused is her relative with whom she claimed to have stayed for about 2 years. Though an identification parade was not entirely necessary for the 1st accused, PW1



proceeded to positively identify the 1st accused and she equally identified the 2nd accused at the identification parade. Having examined the evidence as a whole, I find that PW1 was a credible and reliable witness. I find that the evidence regarding identification of the 1st and 2nd accused has not been impeached. I find that she positively placed the 1st and 2nd accused at the scene of robbery. She was also categorical that the 2 raped her. I therefore find that the prosecution has proved beyond reasonable doubt the two charges of robbery with violence Contrary to section 296 (2) of the penal code and gang rape contrary to section 10 of the *sexual offences Act* No. 3 of 2006. The 1st and 2nd accused are accordingly convicted.”

38. The totality of the evidence adduced before the trial court prove that the appellants assaulted the victims using violence. As regards the identification PW1, observed the appellants under sufficient lighting from lanterns at close range. She gave detailed descriptions, immediately informed relatives and the police, and pointed out the assailants in the subsequent identification parade. Indeed, the testimony of PW2, PW3, and PW4, as well as forensic DNA evidence, fully corroborated PW1’s identification. Leaving no reasonable doubt as to the identity of the appellants. We concur with the submissions made by the respondent’s counsel that the High Court correctly evaluated these circumstances and safely concluded that PW1’s identification was credible and reliable. Consequently, we find that the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

