



**Nzala v Republic (Criminal Appeal E026 of 2023)
[2025] KEHC 581 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 581 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E026 OF 2023
AK NDUNG’U, J
JANUARY 29, 2025**

BETWEEN

MATI NZALA ALIAS DAKTARI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence dated 20/02/2023
in Nanyuki CM Criminal Case No E451 of 2022– Ben Mararo, PM)*

JUDGMENT

1. The Appellant, Mati Nzala alias Daktari, was convicted after trial of abduction in order to subject to grievous harm contrary to section 260 of the Penal Code (count I) and robbery with violence contrary to section 296(2) of the Penal Code (count II). The particulars for count I were that on 27/04/2022 at Timau trading centre within Mbuuri sub-county, Meru County, jointly with others not before court abducted Kennedy Omondi Otieno in order that the said Kennedy Omondi Otieno may be subjected to grievous harm or dispose of. The particulars for count II were that on diverse dates between 27/04/2022 and 30/04/2022 in Mbuuri sub county of Meru county, jointly with others not before court while armed with dangerous weapons robbed Kennedy Omondi Otieno of his property namely (1) pliers, (2) cell tape, (3) tape measure and (4) phone make K G10 all valued at Kshs.2000/= and at the time of such robbery wounded the said Kennedy Omondi Otieno.
2. On 20/02/2023, he was sentenced to five (5) years imprisonment for count I and 30 years imprisonment for count II. The sentences were ordered to run concurrently.
3. The Appellant was dissatisfied with the conviction and the sentence hence his appeal to this court. He filed a petition of appeal but he sought leave in his submissions to amend the previous grounds he had filed and filed amended memorandum grounds of appeal accompanying his submissions. He is challenging the conviction and the sentences on the following grounds.



- i. That the learned magistrate erred convicting him in a case that was not proved against him.
 - ii. The learned magistrate erred convicting him while relying on single witness identification.
 - iii. The learned magistrate erred by failing to appreciate that the scene of crime was not clearly established and processed.
 - iv. The learned magistrate erred convicting him on a case that was full of hearsay evidence and without corroboration.
 - v. The learned magistrate erred for failing to call Safaricom liaison officer to establish matters of Mpesa transactions, voice call data and voice recognition of alleged culprit.
 - vi. The learned magistrate erred convicting him without availing expert witness from the government chemist to adduce evidence of DNA analysis of the blooded exhibits purported to belong to PW1 and allegedly found in his house.
 - vii. The learned magistrate erred by failing to consider his defence.
 - viii. The learned magistrate erred sentencing him to 30 years imprisonment for a case of robbery with violence a case that was not proved against him.
4. The appeal was canvassed by way of written submissions. The Appellant submitted that section 124 of the *Evidence Act* requires corroboration and especially in the evidence of a single witness and specifically a drunkard one who alleged that he was abducted and robbed. As to the count of robbery, there were no facts to support the charge as no stolen items or money transfer was traced to him. That the prosecution failed to prove their case as none of the exhibits produced in court were recovered from his house as there was no inventory which he signed and none of the items produced belonged to him. The bloodied cloth and rope were not proved to have any contact with the complainant as no DNA test was carried out. The house alleged to be the scene of crime was not proved that it belonged to him as no caretaker, or neighbours testified to that fact.
 5. That PW3 testified of voice recording which was not played in court and which was not tested to ascertain whether it was his. No person was availed to testify on call data, on Mpesa transaction made and the prosecution was unable to explain how the Appellant walked for 20kilometers though he had injuries. The prosecution failed to explain how the complainant was abducted and robbed. That it beats logic why he did not report the matter at Timau and how he untied himself which he could have done earlier. That he could have stage managed his mock abduction given his character of abandoning his family and his drunkard behaviour. He submitted that his defence was not analysed vis-à-vis the prosecution's evidence as required.
 6. On the sentence, he submitted that the trial court though it had the discretion to sentence him, failed to consider his mitigation on family background and their vulnerability following his incarceration. He urged the court to re-look into the sentence as he was a first offender and as was held in *Otieno vs Republic (1983) eKLR*, maximum sentence should not be imposed on a first offender.
 7. In opposing the appeal, the Respondent's counsel submitted that the ingredients of abduction were sufficiently proved as the Appellant and his accomplices abducted the complainant, placed him in a house, tied his face, hands and legs and the Appellant was demanding a ransom of Kshs.150,000/-. Further evidence revealed that he was subjected to injuries that were noted by PW5, the clinical officer. As to identification, she submitted that the Appellant indeed admitted that they were friends and they were together on the material date and there was no reason why the complainant would not have been able to see the Appellant and recognise him as they were friends as conceded by the Appellant. As to



- the contention that he was convicted on a single witness evidence, she submitted that section 143 of the *Evidence Act* provides that a court can convict on a single witness evidence.
8. On the count of robbery with violence, she submitted that the ingredients for the charge were proved in that that the Appellant and his accomplices were armed with a jembe, gun and a blank. They tied his eyes, his hands were wrapped with barbed wire and dog chain which were produced in court hence the assailants were armed with dangerous weapons. There were more than three people and violence was used.
 9. As to the sentence, it is submitted that it was upon the Appellant to show that sentence was manifestly excessive, the trial court overlooked some material factors or acted on a wrong principle which he failed to do. That the trial court duly considered his mitigation and the fact that he was a first time offender thus the sentences imposed were not only lawful but lenient in the circumstances.
 10. The evidence before the trial court was as follows; PW1, the complainant testified that he received a call from someone who wanted power connection in Timau. He left for Timau and waited for the said person but he did not show up. While still waiting, he saw someone staring at him whom he knew well as Daktari. They were friends. They talked and they agreed to have tea. They walked around Timau and the Appellant offered to host him. They had a couple of beers. At around 5:00pm, he wanted to leave for Nanyuki but the Appellant protested so he agreed to spend. They went into a pub and he felt like leaving for Nanyuki and the Appellant offered to escort him. He saw three other people behind them. One had a gun, another hand a jembe handle and another had a blank. He was hit and the Appellant told him to keep quiet and he tied his eyes. He also wrapped his hands with barbed wire, they put a cloth in his mouth, they tied his hands with a dog chain and he was taken to a house where his legs were tied.
 11. They took his phone, Kshs.500, pliers, tester and screw driver. They left and locked him there. The next day, the Appellant went and demanded for his phone PIN, ID and his wife's number. He demanded Kshs.150,000/-. He called PW1's sister and they argued over a demand of Kshs. 150,000. After three days while he was in the bathroom, someone came and opened the door and the person left. He crawled to the door, untied himself using his teeth and hands and run to the main road. He walked to Nanyuki and reported the matter at Nanyuki police station. He had injuries and he was referred to hospital.
 12. On cross examination, he testified that they have never disagreed and he maintained that they were friends. That he did not know who opened the door as he pretended to be dead. That he did not see any neighbours. He testified on re-examination that the attackers were four people including the Appellant.
 13. PW2 complainant's wife testified that the complainant left for Timau and they spoke at noon. In the evening at around 8:00pm, she tried calling him but someone responded. She ran out of credit and she tried to call later but the phone was switched off. She contacted the brother who tried to call but the phone was still switched off. She called the next day and the same person responded. She reported the matter. She was called on Sunday by a Balози who informed her that they had found her husband. They went to the station where they found the complainant in a poor state since he had cuts on the lips, wire marks on the face, waist and legs. That the person who picked the phone had said something had happened and he thereafter requested for Ksh.150,000/- to release him. The complainant informed her that he knew the abductors. She testified on cross examination that she did not know the Appellant, she did not recognise the voice that called and had never spoken to the Appellant.
 14. PW3, the complainant's sister testified that she was informed by her brother that it appeared like the complainant had been kidnapped. They reported the matter and she called the number and the person responded by saying that he had kidnapped the complainant for sleeping with his wife. That she informed him that she had 100,000/- but she sent Kshs.2,000/- and the person insulted her. They



- kept communicating and the police tracked him until his arrest. The complainant was found and he informed them that the assailant was a Mkamba (Mganga) who was his friend and he was with other people.
15. PW4, testified that he was contacted by PW2 who informed him that someone was picking complainant's phone. He later called PW1's phone and the person said he wanted to speak to their mother. He also said that he had called PW1 to do wiring at his house but he found him sleeping with his wife. He asked for Kshs.150,000/-. They tried to buy time but they reported the matter to the police. The phone was tracked at Timau. He asked whether he could speak to PW1 and he spoke to him and he informed him that he had been kidnapped. PW1 was found on Sunday at Likii with injuries on the mouth, back, waist and legs. That PW1 informed him that it was his friend from Majengo who was a witchdoctor. He testified on cross examination that the voice was a Kamba accent and it was not the Appellant's voice though voice can be changed.
 16. PW5, clinical officer testified that he examined the complainant and he had multiple injuries on the mouth, both upper arms and anal area. He had mouth ulcers on both sides, thorax was normal, wounds on the wrist area, wounds on anal area, both knees were swollen and tender. He classified the injuries as minor. He produced the P3 form as Pexhibit1.
 17. PW6 the investigating officer testified that a report was made by the complainant's family. The abductees used the complainant's phone and demanded for Kshs.100,000/-. They tried tracing the phone. The complainant fled and accompanied by his wife, they went to police station and he told them who had abducted him. They went to the Appellant's home but they did not find him but found him at his place of work. He informed them that he was a witchdoctor. He told them that he had another house where he took them and they recovered 1 cloth, 1 blade of wood, 1 dog chain, wire, 1 blooded rope, 1 empty bottle, 1 empty cup, 1 matchbox/cigarette, 1 wire, 1 blank which he produced as exhibits. That the Appellant informed them that the complainant had an affair with his wife. That the complainant lost his phone, money, pliers, cello tape, tape measure and KG 10.
 18. He testified on cross examination that the phone was at Timau. That the phone was not recovered. That the complainant identified him as Martin and that he knew him.
 19. In his sworn testimony, the Appellant testified that he is a fundi and a Daktari. That his phone was not okay so he went to Timau and gave it to a fundi. While there, he saw Kenneth and he invited him for tea. He later bought him drink and they drank until 1:00pm. He gave him Kshs.200/- and told him to go home. He then went to work and he got home late. He went to work on the next day. He did not call him. On 07/05/2022, he was found at work by police and they told him what the complainant had told them. They asked whether he knew the complainant and he responded in the affirmative and informed the police that he was with the complainant a few days back. He was arrested and a lady who he did not know came and he was taken to a house where some items were recovered and he was photographed with them. He was taken to an Mpesa dealer who said that she did not know him.
 20. He testified on cross examination that he was a fundi with fundis (sic) but none was a witness. That the complainant was his friend. That the goods produced as evidence were his used for construction. That he was there when the complainant said that he abducted him and that he might have been drunk. That he had no grudge with anyone. That he is a Kamba and the prosecution's witnesses testified that the abductor had a Kamba accent.
 21. I have read and considered the evidence as recorded by the trial court. I have had due regard to the submissions made and case law cited. I have taken into account the applicable law. The issues for determination are whether the prosecution proved its case to the required threshold in law and, secondly, whether the sentences meted out by the trial court were legal and appropriate.



22. This being the first appeal, it is by way of a retrial and parties are entitled to this court's reevaluation, reanalysis and reconsideration of the evidence and its own decision on that evidence. The court should however bear in mind that it did not see the witness testify and give due allowance for that. (See *Okeno v Republic* [1972] EA 32).
23. This principle is buttressed in the decision in *Kiilu & Another v Republic* [2005]1 KLR 174, where the Court of Appeal 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 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. 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; 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.”
24. The burden of proof in criminal cases is well settled. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to for a conviction to lie in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:
- “[I]t 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.”
25. In the famous case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
26. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:
- “Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”



27. The Appellant submitted that he was convicted based on the evidence of a single witness which was not corroborated as required under section 124 of the Evidence Act.
28. It is trite law that the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. The Court of Appeal of Uganda in *Okwang Peter v Uganda Criminal Appeal No. 144 of 1999* held as follows: -
- “Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is 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 possibility of error”
29. It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact. Further, it has not been shown that the evidence tendered had gaps which required to be filled. The evidence of the complainant was clear and furthermore, he knew the Appellant who was his friend. The Appellant also admitted to have met the complainant who was a friend on the material day though he denied committing the offence.
30. He further submitted that no inventory of the recovered items was produced, the house where the items were recovered was not proved to be his and that stolen items were not recovered.
31. On the issue of inventory, I am guided by the case of *Gilbert Onyango Osino & another v Republic* [2016] eKLR where the Court of Appeal held that;
- “No inventory of the stolen items was made available to the court. In *Leonard Odhiambo Ouma & another vs Republic, Nakuru Criminal Appeal No. 176 of 2009*, this Court observed;
- “Failure to compile an inventory as contended in ground 5, is in our view, a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial.”
- In the instant case, we are of a similar view. The evidence of Alex Oremo was clear that a toy pistol and a jungle jacket were recovered from the 1st appellant’s house, while a jungle jacket was recovered from the 2nd appellant’s house. Since there was no uncertainty as to the items recovered from the appellants, we find that the lack of an inventory would not amount to a valid basis upon which to declare a mistrial. This ground is therefore without merit.”
32. In the instant case, the Appellant admitted in his defence that the items produced in court belonged to him and used for construction and cannot therefore be seen to say that the items were not recovered in his house and that the house was not proved to be his.
33. Further, the fact that the stolen items were not recovered from the appellant does not discount the fact that there was robbery on the material day.



34. Was the charge in respect of Count I proved to the required degree? Abduction is defined under section 256 of the Penal Code as follows;
- “ Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.”
35. Section 260 states that;
- “ Any person who kidnaps or abducts any person in order that the person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous harm, or knowing it to be likely that such person will be so subjected or disposed of, is guilty of a felony and is liable to imprisonment for ten years.”
36. There is evidence that the complainant was confined for days in a house as per his testimony by the Appellant. Appellant even demanded money from his family for his release and therefore abduction was proved. Forced was used as well. The chains and ropes that were used were recovered from the Appellant and produced as evidence. These were amongst the things the Appellant admitted in his defence that they belonged to him.
37. As to the second limb of causing grievous harm, PW5 testified as to the injuries that the Appellant sustained. The witnesses also testified that the Appellant had injuries. PW5 classified the injuries as minor. The P3 form indicated the nature of injury as maim.
38. As to the offence of robbery with violence. The evidence was that the complainant was robbed of his phone, tape measure, pliers, cello tape and Kshs.500/-. None of these items were said to have been recovered. PW1 testified that he was attacked by three men and one had a gun, another had a jembe and another one had a blank. He was hit and the Appellant ordered him to keep quiet. He was tied and was led to a house.
39. To prove the case of robbery with violence under section 296(2) of the Penal Code, the prosecution needed to prove the following ingredients as were clearly set out by the Court of Appeal in the case of OLUOCH –VS – REPUBLIC [1985] KLR where it was held:
- “ Robbery with violence is committed in any of the following circumstances:
- a. The offender is armed with any dangerous and offensive weapon or instrument; or
 - b. The offender is in company with one or more person or persons; or
 - c. 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
.....”
40. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The prosecution’s duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the complainant.
41. It is in evidence that the robbers were armed with a gun, jembe and a plank. The complainant was robbed, violence was used as he was hit and tied and he sustained injuries and the Appellant was



in company of three other men. It therefore follows that the charge of robbery with violence was established.

42. As to the sentence, the Appellant termed the sentence as harsh and excessive. It is noteworthy that the Appellant was sentenced to 5 years imprisonment in count I and 30 years imprisonment in count II. The offence under section 260 of the Penal Code provides for a sentence of 10 years and the Appellant only got five years. The offence under section 296(2) attracts a mandatory death sentence. While sentencing the Appellant, the trial magistrate considered his mitigation and he was sentenced to 30 years imprisonment.
43. There is no evidence that the court considered irrelevant factors in arriving at the sentence and neither is the sentence harsh and excessive. The sentence provided in law for an offence under count II is death. The court apparently guided by the Muruatetu decision considered the mitigation of the Appellant and found it fit to award a lighter sentence.
44. Sentencing is at the discretion of the trial court and the appellate court's jurisdiction to interfere with a sentence is a limited one and pegged on established principles in law. In *Bernard Kimani Gacheru vs Republic* (2002) eKLR, the Court of Appeal stated that:-

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

45. I find no grounds upon which to interfere with the sentence.
46. With the result that the appeal herein fails in its entirety and is dismissed.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 29TH JANUARY 2025.

A.K. NDUNG’U

JUDGE

