



REPUBLIC OF KENYA



**Mong'are & another v Republic (Criminal Appeal E061 of 2023 & E011 of 2024
(Consolidated)) [2025] KEHC 11936 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E061 OF 2023 & E011 OF 2024 (CONSOLIDATED)
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

EDWIN AMIMA MONG'ARE APPELLANT

AND

REPUBLIC RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL E011 OF 2024**

BETWEEN

WILSON WANYONYI MANGENYI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment delivered by Hon Nathan Shiundu
Lutta (C.M) delivered in Naivasha CMCR Case No. 416 of 2018)*

JUDGMENT

1. Edwin Amira Monga're and Wilson Wanyonyi Mangeni alias Letuati Keloko herein referred to as the 1st and 2nd appellants were jointly charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the penal code. Both offences were said to have been committed on 10th March, 2018. The 2nd appellant was charged with an alternative count of handling stolen goods contrary to section 322(1) of the penal code. The particulars were that he was found with a stolen suitcase on 23rd March 2018.



2. Each appellant was further charged with the offence of gang rape contrary to section 10 of the Sexual Offence Act of No. 3 of 2006. The 1st appellant faced an alternative act of indecent act contrary to section 11(A) of the *Sexual Offences Act* No. 3 of 2006. They denied the charges and the case proceeded to full hearing. The prosecution presented twelve witnesses to prove its case. The 2nd appellant (1st accused) gave a sworn defense while the 1st appellant (2nd accused) gave an unsworn defense.
3. The trial court later delivered his judgment on 16th November 2023 convicting both appellants on the 1st and 2nd counts of robbery with violence. They were acquitted on the counts of gang rape. They were each sentenced to death on the 1st count while the sentence on the 2nd count was to remain in abeyance.
4. Being aggrieved by the judgment, each appellant filed an appeal. The two appeals were later consolidated on the 3rd December 2024. The 1st appellant's appeal is based on the following grounds:
 - I. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence of Robbery with violence were NOT conclusively proved.
 - II. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that the appellant was not positively identified by the complainants.
 - III. That, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that the exhibits recovered were not proved to be connected to the appellant and therefore could not connect him with the offence in question.
 - IV. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that, the appellant was arrested through leading of co-accused the evidence of co-accused is evidence of the weakest form that could not support a conviction.
5. The 2nd appellant's appeal is based on the following grounds:
 - a. That, the Leaned trial magistrate erred in law and fact by convicting the appellant but failed to find that the ingredients of the. offence Were not conclusively proved.
 - b. That, the learned trial Magistrate erred in law and fact by convicting the appellant but failed to note the appellant was not properly identified.
 - c. That the learned trial Magistrate erred in law and fact by not putting into the appellant's defence.
 - d. That, the learned trial Magistrate erred in law and fact by proceeding to hear the appellant's case yet he had sentenced the appellant's in another case in CR Case No. 415 of 2018 at Naivasha CM's Court.
 - e. That, the identity of the culprit was not proved beyond reasonable doubts.
6. PW1 Rahab Waithera who lived with her grandparents (PW2 & PW3) and child was asleep in her bedroom on 10th November 2018 at 3:00am. She was attacked in the room. She suddenly felt her throat being held. She was forced onto the ground and then led to PW3's door by a man who hit PW3's door and forced it open. They were forced onto the floor and covered with blankets and mattresses. It was now two (2) men. They demanded for money from PW2. One man pulled her to the next room and forced her to the bed. He removed her clothes despite her pleas. He raped her, and placed her on the mattress and left for the other room.



7. The man returned and placed tomatoes, meat from the fridge into an omo bag. He had a panga and dared her to cut him with it. He again removed her clothes and raped her. He finished and took items from her metallic box. He left for PW3's room as the two men were now moving around the house and switched off the lights. After ten (10) minutes, she woke up and found the main door open and she woke up her grandparents.
8. Her phone "Neon Kicka" was taken away. Using PW3's phone, she called her mother. A neighbor took them to Kikopey Police Station and then Gilgil hospital. She confirmed that the thieves stole two TV sets, DVD player, two gas cylinders, unga, clothes, step down suitcase and shoes. She was later called to Gilgil police station and she identified a suitcase (EXB 1), her child's blue baby suit (EXB 2) and two pairs of shoes (EXB 3). After identifying this, she went to identification parades where she was able to identify both appellants separately. The person who raped her was the 2nd appellant.
9. In cross-examination, she fully explained about the lighting in the house and how she was able to identify the appellants and the recovered items.
10. PW2, Francis Ndau Mina is the grandfather to PW1. He confirmed how two men had entered their bedroom that night and demanded for money, threatening to kill him. They switched on the electric lights and he saw them. They searched the house and found Ksh 3,500/= from his trouser. The cash had been given to him by his friends. He heard PW1 scream from her room. The attackers took food from the fridge and ate. He heard a third voice from outside. The rest of the evidence is similar to that of PW1. He identified both appellants as the two robbers. He also lost his phone. In cross examination, he said he was able to see the appellants by use of the electric lights and they were close to each other as they demanded for money.
11. PW3 is the wife to PW2. Her evidence is similar to that of PW1 and PW2. She said PW1 told her she had been raped and she broke down crying. She identified both appellants as the robbers. She used a torch to see them before the 2nd appellant took it away from her. She was not called to an identification parade.
12. PW4 was a girlfriend to the 1st appellant and they have a child together. She confirmed that on 14th March 2018, the first appellant came to the house and brought some clothes and three (3) pairs of shoes for the child. On 25th March 2018, the 1st appellant came to the house with the police who wanted the said clothes (EXB 2) and the shoes (EXB 6). She did not know where the clothes had come from. In cross examination, she confirmed that the clothes (EXB 2) were picked from among others.
13. PW5, Faith Wambui Kang'ethe is a daughter in law to PW2 and PW3. She is the one who had bought (EXB 2) in Nakuru for PW1's child.
14. PW6, Letuati Keloko testified that he had registered his telephone number, XXXXXXXXXX and XXXXXXXXXX using his ID number XXXXXXXX. He knew nothing about telephone number XXXXXXXXXX and he had never lost his ID card. He did not know any of the appellants. There was no cross examination of this witness.
15. PW7 No. 76861 P.C. Charles Ruto attached to DCI Gilgil, said on 23rd March 2018, he was in the office with Cpl, Kimani Opano and Nyamae when the DCIO briefed them of a robbery case in Kikopey on 10th March 2018 and a phone was stolen. One phone was in use with SIM card XXXXXXXXXX in the name of Letuati Keloko within Gilgil. They set up the user of the phone. The user was arrested and the SIM card recovered. The person arrested was Wilson Wanyonyi (2nd Appellant). He took them to his house in Nyamongo where several items were collected as per the inventory (EXB 7). The items



- included shoes, bags, jacket, coats, brown boot shoes, bag mobile phone, clothes. The 2nd appellant signed the inventory (EXB 7). The brown suitcase (EXB 1) was identified by PW1, as belonging to her.
16. Upon further investigations, the 2nd appellant led them to the 1st appellant's house who told them some items had been sold but some clothes were taken to his girlfriend (PW4). He took them to the house where PW4 was and items EXB 2 and EXB 3 were recovered.
 17. In cross examination, he said the 2nd appellant had inserted his sim card in the stolen handset.
 18. PW8 No. 235976 CIP Joseph Njunge conducted the identification parades in respect of both appellants separately. The witness (PW1) identified them very well. He produced the forms EXB 4(a) and (b) saying the appellant signed them. This witness gave a detailed account of how the identification parades were conducted.
 19. PW9 Dr. David Kuria produced the P3 form in respect of PW1. He said PW1 had bruises on the vaginal area, a whitish discharge and a bruised vaginal wall. He confirmed that PW1 had been raped.
 20. In cross-examination, he said from the history she knew the person who had raped her.
 21. PW10 Kipng'etich Bernard, a government analyst, examined PW1's biker and blood from the appellants and another. They were to trace for any spermatozoa in the black biker (EXB 9). His finding was that semen stains on the biker belonged to the 1st appellant and another.
 22. PW11 No. 73528 Quinto Odekee is attached to DCI. He monitors Mpesa and communications on receipt of court orders. He was instructed on 10th March (EXB 11) by the investigating officer to get the call logs for:
 - a. IMEI XXXXXXXXXXXXXXXX
 - b. IMEI XXXXXXXXXXXXXXXXFor (a) it was registered by ID No. XXXXXXXX - XXXXXXXXXX by PW1 who used it until 9th March 2018. It was next used by No. 710333153 Letuati Keloko from 8:34pm on 9th March 2018 to 11th March 2018 at 7:07pm.
 23. For (b) on 15th February 2018, the phone was used by ID No. XXXXXXXX-PW2 phone No. XXXXXXXX. Another sim card was inserted on 14th March at 10:35pm on line XXXXXXXX registered under ID XXXXXXXX Edwin Mong'are (1st appellant) who used the phone until 13th March at 11:02pm. He produced the reports (EXB 12 and 13) and certificate (EXB 14).
 24. PW12 No. 88255 Seargent Alice Mulahi was the investigating officer. She confirmed the robbery report and that the appellants were arrested by use of the stolen mobile phone. She produced the recovered items EXB 1, 2, 6, 7, 11 a-c, 12, 14, 15, and 16.
 25. In cross examination by the 2nd appellant she said beside signing the inventory of the recovered items, the 2nd appellant was identified by PW1. She stated that it is the 2nd appellant who led them to the 1st appellant. Further that nothing was recovered from his house. He had however assisted the police recover some of the stolen items. She said the DNA sampling was done with his consent.
 26. The 1st appellant in his sworn defense denied the charges. He said he was arrested on his way home from work. This was in March 2018 around 4:00pm. The police took him from his house and searched it. That they took his bag alleging it to have been stolen. He explained to them how he had bought it but the seller was never traced. He was not satisfied with the identification parade.



27. The 2nd appellant in his unsworn defence stated that on 25th March 2018 at around 5am he was in the house when police officers came there and started assaulting him. They conducted a search and recovered nothing and he was taken to the police station in the company of his girlfriend. He produced a copy of the OB (DEXB 1). One Patrick Lang'at who sold him a phone and some clothes was arrested and even booked but was released under suspicious circumstances. He stated that the identification parade was conducted unprocedurally as the witnesses had seen him before the parade. He produced a copy of the first report DEXB2.
28. The appeal was canvassed by way of written submissions.

1st Appellant's submissions

29. These were filed on 13th May, 2025. While relying on the case of Oluoch V Republic [1985] KLR he submitted that the prosecution did not prove that he was armed with any dangerous or offensive weapons. That it was not proved anywhere that he was in the company of others when the offence was committed. Secondly, he challenged the identification since PW1 – PW3 did not say how they were able to identify him. That the versions by the three witnesses (PW1-PW3) of what happened was so different.
30. He also argued that the sentence is unconstitutional. Reference was made to the cases of James Kariuki Wagana V Republic [2019] eKLR among others

2nd appellant's submissions

31. These were filed on 6th December, 2024. It is his submission that PW1-PW3 did not explain much about the issue of electricity as to when it was on or off. He wonders how the torch allegedly assisted PW3 unless, she was colluding with the robbers. He argued that the evidence on identification does not add up. Despite being mentioned he submitted that the DNA did not connect him to the rape. He submits that PW3 never gave any description of him. That the identification parade did not follow the correct procedure. He contends that members of all sizes and types were mixed in the said parades.
32. On the allegations of recoveries, he argued that he explained how he came into possession of the bag. Further that the evidence of the Liaison officer (PW11) was that he was not the owner of the registered line but PW6.

Respondent's submissions

33. These were filed by Alex Ndiema Senior prosecution counsel alongside the grounds of opposition. Counsel outlined the ingredients of robbery with violence. He argued that PW1 was assaulted, raped and her assailant was in the company of another. PW2 also described his experience.
34. Secondly that PW1 identified the appellants well. Identification parades were conducted and both appellants were identified as per the evidence of PW8. Counsel submitted that the exhibits were connected to the 2nd appellant as stated by his girlfriend (PW4). That there was nothing wrong with the 2nd appellant leading to the 1st appellant's arrest.
35. He submitted that the prosecution case was consistent, direct clear and without any doubt. That PW1 and PW2 mentioned pangas which the robbers were armed with.



Analysis and determination

36. This being a first appellate court, it has the duty to re-evaluate, and re-consider the evidence adduced before the trial court and arrive at its own independent conclusion. It should bear in mind that unlike the trial court it did not have the advantage of seeing and hearing the witnesses testify and must give an allowance for that. This is a principle that was set out in the case of *Pandya V Republic (1957) E.A 336* and followed in several other cases among them *Okeno V Republic 1972 E.A 32*; *Kiilu and another V Republic [2005] I KLR172*; *Simiyu and another V Republic [2005] I KLR 192*.
37. I have carefully considered the record of appeal, grounds of appeal, parties submissions cited cases and the law. The main issue for determination is whether the charge of robbery with violence was proved against both appellants or any one of them.
38. Robbery is defined under section 296(2) of the Penal Code as follows:
- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately 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.
39. Therefore, for a charge of robbery with violence to be proved the following must accompany the theft:
- Offender must be armed with any dangerous weapon or
 - Offender is in company of one or more persons or
 - Immediately before or after time of robbery, the offender wounds, beats or uses violence to any person See (i) *Johana Ndungu V Republic CRA 116/1995 (1996) eKLR* (ii) *Dima Denge & others v Republic [2013] eKLR*.
40. From the onset I must clarify that for a charge of robbery to be proved any of the outlined ingredients accompanying a theft/stealing is sufficient to prove the charge. One does not have to prove all of them hence the use of the word OR
41. From the evidence of PW1, PW2, PW3 they were asleep on the night of 10th March, 2018 when they were attacked. PW1 who is the grand child to PW2 and PW3 said the time was 3.00am. The robbers were more than one and were in a hurry to leave. They took food from the Fridge and packed and also ate it. Besides that, PW1, was raped by one of the robbers twice in intervals. PW1 and PW2 also testified that one of the robbers had a panga, which he used to threaten each of them at different points.
42. PW2 testified that he had Ksh 3,500/= in his trousers on a chair and the robbers took it. PW1's phone and child's clothes and suitcase were taken. All this evidence confirms that there was robbery as stated in the two counts. The trial court rightly found so.
43. Now the remaining issue is whether the appellants were identified as the robbers. PW1 attended two identification parades in respect of both appellants. In the first one she identified the 2nd appellant while the 1st appellant was identified in the second identification parade. No serious questions were raised in cross examination of PW8 who conducted the parades. The parade forms EXB 4a & (c) were signed respectively by 2nd appellant and 1st appellant. The forms show that each of them was satisfied with their respective parades. The claim that the parades were not well conducted has no basis at all. Besides the identification by PW1 both appellants were identified by PW2 and PW3 though it was dock identification, it was a back up to PW1's identification.



44. Secondly was recovery of some of the stolen items which were identified by PW1, PW2, PW3 and PW4. PW1's stolen phone was traced to the 2nd appellant who was using PW6's name on the sim card. He never explained how he came to possess PW1's phone and he was using PW6's names as the registered owner of the sim card line No. XXXXXXXXXXX. PW8 explained how the phone and simcard were traced to him and how he was arrested outside Juaraka Supermarket. He is the same one who led officers to the 1st appellant. He could not have done that if they were not working together with the 1st appellant.
45. Upon being identified by the 2nd appellant, the 1st appellant led the officers to his girlfriend's house where he had taken some of the items stolen from the house of PW2 and PW3. The said girl friend (PW4) confirmed that the clothes (EXB 2) and shoes (EXB 6) had been brought to her by the 1st appellant. These items were well identified by PW1 and PW5 (a daughter in law of PW3) as belonging to the complainants. The suit case (EXB 1) identified by PW1 and PW3 was found in the 2nd appellant's house. He never availed the person who allegedly sold it to him or any proof of purchase of the same.
46. The evidence against the appellants herein is stronger than what was stated in the case of Wamunga V Republic [1989] KLR 424 and 426 where the court stated:
- “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 a basis of conviction”.
47. In the present case there was the evidence of identification and being found in possession of stolen items in less than 14 days after the robbery. I therefore find the evidence against both appellants to be overwhelming.
48. The 1st appellant challenged the sentence of death. Death is a mandatory sentence for robbery with violence. The law has not been amended. This court cannot therefore interfere with it. The same is therefore confirmed.
49. The upshot is that the appeal lacks merit and I hereby dismiss it.
50. The conviction and sentence are upheld.
51. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

