



**Odera v Republic (Criminal Appeal E102 of 2024)  
[2025] KEHC 10033 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10033 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E102 OF 2024**

**A MABEYA, J  
JULY 11, 2025**

**BETWEEN**

**BRAXTON OUMA ODERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. J.M. Wekesa SPM delivered on the 19/12/2024 in Nyando SPMC Cr. Case No. 552 of 2022, Republic v Braxton Ouma Odera)*

**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](#).
2. The particulars of the charge were that on the nights of 12<sup>th</sup> and 13<sup>th</sup> December 2022 at Kowuor village in Sigoti location in Nyakach sub-county within Kisumu County, jointly with others not before court while armed with crude weapons, he robbed Anjelina Achola Achingo of her four iron sheets and chain link wire mesh all valued at approximately Kshs. 8,550/- and at or immediately before or immediately after the time of such robbery murdered the said Anjelina Achola Achingo.
3. The appellant also faced the alternative charge of handling stolen property contrary to section 322(2) of the [Penal Code](#).
4. The particulars of the charge were that on 14/12/2022 at Kowuor village, Sigoti location in Nyakach sub-county within Kisumu County, otherwise than in the cause of stealing, retained 14 iron sheets, 200 metres chain link wire mesh, the property of the late Anjelina Achola Achingo, knowing or having reasons to believe them to be stolen property.
5. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of eleven (11) witnesses. The defence evidence was based on the appellant's sworn testimony.



The trial court found the appellant guilty of the main count and sentenced him to suffer death as provided for under section 296 (2) of the Penal Code.

6. Dissatisfied with that decision, the appellant filed his petition of appeal dated 23/12/2024 and supplementary grounds of appeal dated 22/4/2025 which may be summarised as follows: -
  - a. That the trial court erred in law and in fact in convicting and sentencing the appellant on a defective and duplicitous charge sheet floated under section 295 as read with section 296 (2) of the Penal Code.
  - b. That the trial court erred in law and in fact in convicting the appellant based on circumstantial evidence that did not amount to proof beyond reasonable doubt.
  - c. That the trial court erred in law and in fact in not according the appellant legal representation under the state expenses and in not fully disclosing the prosecution case to him by failing to furnish him with the statements of the prosecution witnesses occasioning him substantial injustice.
  - d. That the trial court erred in law and in fact in sentencing him to a death sentence without considering the prevailing circumstances during the commission of the offence.
7. In support of his appeal, the appellant filed written submissions in which he submitted that nobody saw him robbing or assaulting the deceased, that there was no written authority authorizing the members of the public to enter and search his house and recover the alleged stolen items thus infringing his constitutional right under Article 31 (a) and 50 (4) of the Constitution and sections 57 of the National Police Act, Sections 25, 26 and 29 of the Criminal Procedure Code.
8. That the issues leading up to his conviction were not clear and thus his death sentence ought not to stand.
9. On its part, the State submitted that all the ingredients of the offence of robbery with violence were proved beyond reasonable doubt, that the items stolen on 12/12/2022 were recovered on the 14/12/2022 from the appellant who was unable to explain how they came to his possession.
10. That the appellant was placed at the scene of the crime by the testimony of PW2 and PW3. Further, that the sentence meted out on him was appropriate as the circumstances that led to the death of the victim were so cruel and intense.
11. This being the first appellate Court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion but at all times bearing in mind that I did not see the witnesses testify. (See *Okeno v Republic* [1972] EA 32.)
12. At the trial, PW1 Dorothy Achieng Ochola, the deceased's granddaughter testified that on the particular she left the deceased at her home after closing the door. When she came back the following morning, she did not find the deceased in her bedroom. She noticed that some iron sheets and chain link that she had bought for the deceased were missing from the deceased's house. Later on, she discovered her body in the next room. At the door step, she saw a neckless with Rastafarian colours which people identified as belonging to the appellant.
13. She identified two iron sheets and the chain link recovered from the appellant's house as part of those items she had bought for the deceased. PW2 Alice Adhiambo told the court that on the material day between 6 and 7pm, the appellant visited her for illicit brew but she told him she had none. He left and she did not know where he headed to. The following day, she heard that the deceased had been killed.



14. PW3, Lucas Olueny Ochela testified that he saw the appellant on the night of the incident with blood on his left shoulder and knuckles. That the appellant was dressed in a black trouser and a t-shirt and was wearing a necklace in rasta colours which he identified in court.
15. PW4, Nancy Atieno Ouma testified that on 12/12/2022 at around 7pm, she heard the deceased screaming three times saying “what is this. Ni nini hapa kama chuyo” but she did not go there. That the following she, PW1 and others discovered the deceased body in one of the rooms in her house. They recovered a necklace which they later learnt belonged to the appellant.
16. PW5, Penina Aendi Olueny, the appellant’s grandmother told the court that her son (pointing at the accused in court) had stolen iron sheets and wire that were recovered from her son’s house. That at the time, it was the appellant who was living in that house.
17. PW6, Evans Otieno Omego, the area Assistant Chief testified that he was informed that the deceased had been found dead in her house. He called the police who came and removed the body to the mortuary. That he was later informed that the deceased’s stolen items were at PW5’s. He proceeded there and photographed the same. The appellant was arrested by members of the public and he confessed to him that he, the appellant had murdered the deceased with one John Ochieng.
18. PW7, Dr. Dickson Mchana carried out the deceased’s post-mortem. On examination, he concluded that the cause of death was suffocation due to lack of breathing. PW8, PC Peter Kimurei Kebere produced two photographs of the scene of crime which photos did not show the appellant committing the crime.
19. PW9, John Otieno Olweny and PW10, Kaundi Oluoch Nyandiko both testified that PW9 received a call from PW6 on 13/12/2022 who asked him to go help him ascertain alleged stolen items from a murdered woman’s house. They both testified that the items were iron sheets and a roll of chain link fence which they identified in court.
20. PW11, No. 92274 PC Nathan Ochola, the Investigations Officer, testified that on 14/12/2022 while on duty he got information about a robbery with violence incident and on proceeding to the scene, found a body lying on the floor of the house which they later removed to a mortuary.
21. He told the court that there were physical injuries on the neck and right leg as well as blood stains where the deceased was sleeping but had been removed to the floor. That a necklace of rasta colours was found at the scene of crime which the appellant later admitted to be his. That subsequently, some items, iron sheets and chain link fence were found in a house where the appellant used to stay so the chief mobilized the youth to arrest him.
22. When placed on his defence, the appellant denied committing the offence. He stated that he did not know the deceased. That on 14/12/2022, he was at his sand harvesting job and while on a break at a shop, he was arrested by police who demanded Kshs. 5,000/- from him. Since he did not have it, he was taken to the Station and detained. Subsequently, he was charged with the offence before court.
23. The first issue for consideration is whether the trial court violated the appellant’s rights under Article 50 (2) (g) and (h) of the *Constitution* as contended. The same provide as follows: -
  - “ 50(2) Every accused person has the right to a fair trial, which includes the right-
    - (g) to choose, and be represented by an advocate, and to be informed of this right promptly.



- (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 his right promptly.”

24. Article 50 of the *Constitution* guarantees an accused person’s right to fair trial. The said rights cannot be derogated by virtue of Article 25 (c) of the *Constitution*. Under sub article 2 (g), the court is under a duty to inform an accused of his right to be represented by counsel of his own choice. The court has to inform the accused of such right promptly before plea is taken or before the hearing commences. This is to enable the accused make an informed decision whether or not to seek services of counsel or seek services of counsel from the Legal Aid Committee.
25. In *Republic v Karisa Chengo & 2 others* [2017] eKLR, the Supreme Court considered the issue of legal representation at state expense and held that: -

“(87) Article 50(2) (h) of the *Constitution* provides that “[every accused person has the right to a fair trial, which includes the right... 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.” It does not define what “substantial injustice” means. However, in *David Macharia Njoroge vs Republic*, (supra), the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result...” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in *Thomas Alugha Ndegwa vs Republic*; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

(88) In addition to the above, we do not agree with the Court of Appeal’s holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the *Constitution* is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the *Legal Aid Act*. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). 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”.



26. In *Bernard Kiprono Koech v Republic* [2017] eKLR, the Court considered an argument similar to what is now before this court and stated as follows: -

“ 39. Secondly, there is now a framework in place, which was not in place at the time of the appellant’s trial, under which an accused person can apply under section 40 of the *Legal Aid Act* No. 6 of 2016 for legal representation at state expense. Section 43 of the *Act* imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:

43.

(1) A court before which an unrepresented accused person is presented shall —(a) promptly inform the accused of his or her right to legal representation;(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and (c) inform the Service to provide legal aid to the accused person.

40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the *Karisa Chengo* case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose.”

27. The appellant took plea on the 29/12/2022. It is recorded “He has a right to retain an advocate to represent him at his own cost.” The appellant proceeded to conduct his defence by himself.

28. Although the trial court stated that the appellant had a right to retain an advocate ‘at his cost’, from the Supreme Court’s decision cited above, that was not enough. The trial court should have informed the appellant that he was entitled to legal representation at the state expense since there would have resulted substantial injustice in this case, considering that the charge carried a mandatory death sentence.

29. The Court has considered the record and the cross-examination undertaken by the appellant, it is clear that the appellant was incapacitated in the conduct of his defence. This was a proper case where an accused should have been informed of the right to legal representation at the state expense.

30. In having proceeded with the prosecution of the appellant without having informed him that he had a right to representation at state expense and not only at his own cost, that amounted to an irregularity. No court can avoid or disregard express dictates of the *Constitution*. The prosecution was defective in so far as the likelihood of substantial injustice was to occur by failing to give the advice dictated by the *Constitution*.

31. In *Robert Sang Kimeto v Republic* [2016] eKLR, the court held that: -

“In a recent case, *Republic v Edward Kirui* [2014] KLR, the Court of Appeal, dealt with a different irregularity namely, the non-compliance with Section 169(3) of the *Criminal*



*Procedure Code* and declared a mistrial. The court cited the definition of mistrial in *Black's Law Dictionary* (9<sup>th</sup> Edition) as:

‘a trial that a judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings’.

The court also cited with approval a portion of the judgment of the Supreme Court of India in *Murugan & Another v State by Prosecutor, Tamil Nadu & Another* [2008] where the case of *Bhagwan Singh v State of M. P.* [2002] 4 SCC, 85 was cited, as follows: -

‘The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than the conviction of an innocent. In a trial where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not’.

32. In the present case, I have found that the trial court failed to adhere to the dictates of the Article 50 (2) (h) and section 43 of the *Legal Aid Act*, 2016. It failed to inform the appellant that he was entitled to legal representation at the state expense or inform the Service of that fact. That led to flawed trial thereby leading to a mistrial.

33. In the circumstances, what then should be the end result? In *Pius Olima & Another v Republic* [1993] eKLR, the Court of Appeal delivered itself thus: -

“Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. ... The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court ... is defective. If the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case”.

34. In the present case, the appellant was charged with a serious charge of robbery with violence. The offence resulted in the loss of a life. In the circumstances, I am persuaded that it will be in the interests of justice that a retrial be ordered in this case. The offence was committed only slightly under three (3) years ago.

35. Accordingly, I quash the conviction and set aside the sentence. I direct that there be a retrial before a different Magistrate at the Principal Magistrates Court at Nyando. I order that the appellant be produced before that court on 22/7/2025 to plead afresh to the charge of Robbery with Violence contrary to section 296(2) of the *Penal Code*.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF JULY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

