



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Republic (Criminal Appeal E004 of 2021)
[2025] KEHC 9749 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E004 OF 2021**

PJO OTIENO, J

JULY 1, 2025

BETWEEN

KENNEDY OMONDI ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of Hon.
T.A. Odera (SPM) in Mumias CMCC Case No.6 of 2020)*

JUDGMENT

1. The Appellant was arraigned before the Senior Principal Magistrate at Mumias, in Criminal Case No. 6 of 2020, 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 offence were given to have been that on the 17th day of December, 2019 along Musanda-Lusheya 'B' road, Musanda location, Mumias Sub-county, within Kakamega County, the Appellant with aliases Yusuf alias Idd and Okoth, jointly with others not before court, while armed with a dangerous weapon, namely panga, robbed Benson Musiandalo Wandenda of a mobile phone make ITEL, black in color, valued at Kshs. 1500/-; and immediately before such robbery used actual violence to the said Benson Musiandalo Wandenda.
3. The Appellant pleaded guilty and was convicted on his own plea of guilty and sentenced to death.
4. Aggrieved with the conviction and sentencing of the trial court, the Appellant has lodged this appeal challenging the conviction on the grounds that the case was poorly investigated and evidence full of contradictions. He added that the sentence imposed was unconstitutional due to its mandatory nature.



5. The appeal was directed to be canvassed by way of written submissions but in the file, I have only seen the Respondent's submissions on record. That however does not diminish the courts duty on a first appeal to re-appraise and re-evaluated the entire record and come to own independent conclusions.

Respondent's Submissions

6. It is the submission by the Respondent that the Appellant took plea in accordance with the provision of section 207 of the *Criminal Procedure Code* and was duly cautioned on the severity of the offence by both the court and his pro bono counsel before he pleaded guilty to the charge. It is added that section 348 of the *Criminal Procedure Code*, bars any appeal from the conviction based on a plea of guilt by the accused person, save for the extent or legality of the sentence.
7. In this case the Respondent points out that Appellant has challenged the death sentence meted as being unconstitutional. In rebuttal, the Respondent submits that death sentence is still legal and statutory and available at the discretion of the court based on the facts of each case. The Respondent considers this case to present one of the most heinous cases in that the Appellant was armed with a dangerous weapon namely a panga and used the weapon against one Seline, viciously thereby inflicting fatal injuries. In support of the sentence as being commensurate, reliance is placed on the decision in *Maritim v R* [2022] eKLR where the court held:-

“Death sentence is still lawful in Kenya, and may be imposed where circumstances so deserve.

It has been observed that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder [see Prof. Ngugi J in *James Kariuki Wagana v Republic* [2018] eKLR]; say, where excessive or brutal force has been employed, or offence committed in most bizarre manner, or in circumstances which expose many to danger or injury or death.

... The appellant, who was in the company of others, robbed the complainants, and in the course of the robbery, lethal force was used, and also they were armed with a dangerous weapon which was used to shoot and kill the deceased; the cause of death was stated to be a penetrating bullet through his chest.

The level of violence unleashed on the complainants is sufficiently serious to warrant death sentence or long period of imprisonment. A person was shot dead by the gang of thugs who attached the complainant and his colleagues.”

Issues, Analysis and Determination

8. Having considered the grounds of appeal as against the proceedings of the lower court and the submissions by the Respondent, and being mindful of the obligation of the court on a first appeal, the court discerns the issues for determination to be: -
 - a. Whether the appeal against conviction on a plea of guilty is competent?
 - b. Whether the sentence imposed against the appellant should be set aside for being unconstitutional?

Whether the Appellant's appeal against his conviction on a plea of guilty is merited

9. Though the Appellant pleaded guilty to the offence of robbery with violence contrary to section 295 as read with section 296[2] of the *Penal Code*, he has attacked that conviction on the ground that the prosecution failed to tender evidence to support his conviction. That ground goes to the merit on



- whether the fact which were read to him and which he confirmed to be true did disclose the offence of robbery with violence.
10. The manner of recording a plea is provided for in section 207[1] and [2] CAP 75 of the *Criminal Procedure Code* which provision has been innumerable times been interpreted by courts on full import. One only needs to cite *Adan v. Republic* [1973] EA 445 where the court held;
 - “i The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
 - ii The accused own words should be recorded and if they are an admission a plea of guilty should be recorded;
 - iii The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - iv If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
 - v If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence, together with the accused’s reply should be recorded.”
 11. According to the proceedings of the trial court, when the Appellant first appeared in court on 8/1/2020, he indicated that he was conversant in both English and Kiswahili. The court when reading out the charges to the Appellant warned him of the nature of the charge and its consequences. The Appellant responded to the charges by stating, “true”. The court then appointed Messrs Anono Advocate to act pro bono for the Appellant and placed the file aside. When the Advocate addressed the court, it is on record that he indicated that the Appellant insisted on his plea of guilty against his advice.
 12. The facts of the case were again read out in open court and the Appellant changed his plea by saying that the facts were not true. The court recorded a plea of not guilty and adjourned the matter to another date for hearing while admitting the Appellant to bond.
 13. The next time the matter was in court was on 19/2/2020, the Appellant told the court that he desired to change his plea once again. The court once again warned him of the severe nature of the charge and possible sentence. At that point the Advocate informed the court that the Appellant no longer wanted him as counsel in the case and sought that the Accused be mentally assessed. At that point it appears the Advocate pulled out of the case.
 14. The charge was again read out and the Appellant responded with the Kiswahili word ‘Kweli’. The court entered a plea of guilty after which the facts were read out to the Appellant. To the facts, the Appellant responded that the same were true as read. The conviction was thus entered where after, the Appellant was granted the opportunity to mitigate before the sentence was passed.
 15. The provision of section 348 of the *Criminal Procedure Code*, as pointed out hereinbefore, forbids appeals from conviction based on plea of guilt unless the court discerns that the plea was equivocal. In this matter, besides the fact that the Appellant has not alleged that the plea was equivocal, the court’s reading of the record satisfies it that the plea was indeed unequivocal.



Whether the sentence imposed against the Appellant was unconstitutional

16. The sentence prescribed under the *Penal Code* for the offence of robbery with violence is death. The Court of Appeal did in the cases of Godfrey Ngotho Mutiso v R [2010] eKLR and Criminal Appeal No. 12 of 2021 Julius Kitsao Manyeso v Republic declare the death penalty and life imprisonment unconstitutional.
17. The appeal was argued on the basis of the two decisions and others which had interpreted the decision in Francis Muruatetu & Another to have declared death sentence unconstitutional. However, the Supreme Court has now settled that question in other subsequent decisions the latest being the decision in Republic v Julius Kisao Manyeso [2025] KESC 16[KLR] in which the court reiterated that so long as the legislature has not deemed it right to do away with death penalty and other mandatory sentences in our statute books, such sentences remain legal and it is an outreach by the Court of Appeal to give sentences other than those in the statute.
18. The facts of the case which the Appellant agreed to was that in the company of others he was armed with a panga and threatened to harm one Benson Musindalo Wandedi before robbing him and shortly thereafter also robbed one Peter Tathua, cutting him. They also assaulted one Seline Adhiambo Muruka who succumbed to the injuries inflicted.
19. In his mitigation, the Appellant expressed no remorse and his only mitigation was that he wanted a non-custodial sentence in order to be able to take care of his parents.
20. Accordingly, for the reasons set out above, this appeal fails entirely and is dismissed.
21. Right of appeal within fourteen [14] days.

DATED AND SIGNED THIS 12TH DAY OF JUNE, 2025.

PATRICK J O OTIENO

JUDGE

Dated, signed and delivered at Kakamega, this 1st day of July, 2025.

S. MBUNGI

JUDGE

In the presence of:

Ms. Osoro for the DPP on-line

Appellant present on-line

Court Assistant: Ang'ong'a

