Otiang v Republic (Criminal Appeal E001 of 2025)
[2025] KEHC 18178 (KLR) (4 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18178 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E001 OF 2025

TW OUYA, J

DECEMBER 4, 2025

BETWEEN

JOSHUA ODHIAMBO OTIANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the Honourable I.F Koome SRM arising from Thika CMCC No. 789 of 2018 delivered on 10th December 2024)

JUDGMENT

1. The appellant was arraigned before the Principal Magistrate Court at Ruiru and charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code.

2. The particulars of the charge were that on 3rd day of February 2018 at Matopeni area in Ruiru Sub County within Kiambu County while in the company of four men not before court, the appellant robbed Agnes Njeri Mburu of cash Kshs. 19,000.00, TV Set make LG valued at Kshs. 28,000, two mobile phones make Samsung valued at Kshs. 12,900 and at the time of the robbery, used actual violence to the said Agnes Njeri Mburu.

3. He denied the charges and a plea of not guilty was entered against him. The Respondent called five (5) witnesses while the appellant gave unsworn testimony. By a judgment dated 10th December 2024, the trial court convicted the appellant under Section 215 of the Criminal Procedure Code for the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. Consequently, the appellant was convicted to death on 22nd January 2025 as per the law.

4. At the trial court, PW1 Gladys Wangui gave sworn statement as the court confirmed that she understood the nature and meaning of an oath. She testified that on 2nd March 2018 at about 3.00am she was asleep when she heard screams and on peeping, she saw her mother screaming. She saw four

thieves with torches and they commanded her to go to sleep but she refused. In the course of the robbery an alarm went out and the thieves ran away. She managed to lock one of the thieves inside from outside and ran outside to hide. She identified the appellant as the thief that she had managed to lock out. When the police came, she informed them that she had locked one of the thieves inside. The thieves had covered themselves with scarves and caps while they were strangling her mother. She managed to see the appellant's face when the lights were switched on once the police had come and brought him out.

5. PW 2 Henry Kahugu testified that on the fateful night of 3rd February 2018 at around 2-3 am he heard some noise and it was raining a lot. He woke up but the lights were off. He took a Jembe and on getting outside, he heard PW1 saying wameua Mum. He proceeded to the door of the said house. The police came and came out with the appellant and Agnes. The police had big torches.

6. PW3 Caroline Wangui also testified that he went to the scene of the incident when he heard PW1 screaming that mum ameuawa. She saw the police coming out with the appellant from Agnes's house.

7. PW4 No. 244796 Joel Chege Mwangi testified that on 3rd February 2018 at 2.00am when he was instructed by Sgt Masita to take part in apprehending armed robbers. They proceeded to the plot, but the lights were off. They then met PW1 who pointed to them where her mother was. There was a rope with blood and a knife. The police arrested the appellant from the scene. There was a rope with blood and a knife. Outside the plot there was metal rods and TV set Samsung. He identified the appellant as the person that he arrested on the fateful night.

8. PW5 testified that on 3rd February 2018 she was attacked by a group of four men as she was sleeping in her house at about 2.00am. they beat her, strangled her with a rope and stole from her valuables including money from her grocery shop. In the course of the robbery, the alarm rang causing the robbers to hold a knife at PW5 demanding to know the person who had raised the alarm. The robbers scrambled away from the house but in the process the appellant was left behind. The appellant has a metallic rod, a knife and a torch, he ordered PW1 to go back to bed and keep quiet. PW5 struggled and opened the window, she saw neighbours outside and whispered that someone was inside. Shortly thereafter, the police came and found the appellant in the house. He dropped the metallic rod, knife and torch in the house. They were both taken to the police station and then PW 5 was escorted to hospital for treatment.

9. In his defence, the appellant testified that he was a victim of circumstances as he had been dragged and beaten by two people whom he met on his way back home. He thought the police on patrol would save him but instead they turned against him demanding that he confesses to a robbery he knew nothing about. He was tortured and beaten but there was nothing to confess to since he was not a criminal. He raised concern that the investigating officer failed to testify despite undertaking investigations.

10. The trial court noted that the appellant would have been a suitable candidate for a lenient sentence were it not for the mandatory nature of the sentence of death for cases of robbery with violence. Consequently, the appellant was sentenced to death as per the law.

11. Aggrieved and dissatisfied with the decision of the trial court, the appellant lodged the instant appeal against both conviction and sentence.

12. The Respondent opposed the appeal.

13. The court directed that the appeal be canvassed through written submissions.

14. The Respondent submitted that the prosecution discharged the required standard of proof by proving all the ingredients of the offence of robbery with violence as per the decision of the Court of Appeal in John Kariuki Gikonyo v Republic.

15. Therefore, the appellant having been found at the very scene of the crime participated in the criminal conduct under the doctrine of common intention as espoused in Section 21 of the Penal Code.

16. Although the incident occurred at night, the trial court was convinced that there was sufficient time and adequate light to enable PW1 clearly see his assailants, including the appellant.

17. It was further submitted that the appellant was accorded a fair trial as he was represented by two advocates who had an opportunity to extensively examine the prosecution witnesses.

18. Regarding the sentence, the Respondent submitted that the same was lawful and suitable in the circumstance considering the manner in which the appellant and his accomplices carried out the robbery. The trial court was therefore correct in considering that the aggravating circumstances outweighed the mitigating circumstances. Reliance was placed on the case of Chege v Republic [2025] KECA 1207 (KLR) where the Court of Appeal upheld the sentence of death against the appellant.

19. Therefore, the Respondent urged that the appeal be dismissed and that the finding of the trial court on both conviction and sentence be upheld.

20. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in David Njuguna Wairimu V Republic [2010] where the court of appeal held:

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

21. I have considered the Trial Court's proceedings, the Petition of Appeal, the submissions by the parties and I identify issues for determination as follows:

    i. Whether the ingredients of robbery with violence were established;

    ii. Whether there was sufficient evidence linking the Appellant to the offence;

    iii. Whether the Appellant's defense was properly considered; and

    iv. Whether the sentence imposed was lawful and constitutional.

22. On the first issue, the Appellant was convicted of the charge of robbery with violence. To prove the offence of robbery with violence, the element of stealing must be proved coupled with one or all of the other elements set out in section 296(2), namely that the offender was armed with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or immediately after the time of the robbery he wounded, beat, struck or used other personal violence on

the victim. In Johana Ndungu V. Republic, CR. APP. No. 116 of 1995 the Court extrapolated the position as follows:

> " In order to appreciate properly as to what acts, constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296(2) ..."(See also Ganzi & 2 Others V. Republic (2005) 1KLR 52).

23. The Court of Appeal in Oluoch v Republic [1985] KLR set out the essential elements of the offence as follows:

    i. The offender is armed with any dangerous and offensive weapon or instrument;

    ii. The offender is in company with one or more persons;

    iii. At or immediately before or immediately after the robbery, the offender uses actual violence on the victim

24. In the instant case, PW5 testified that on 3rd February 2018 she was in the house when a group four men stormed into his house while armed with dangerous weapons and robbed her of cash Kshs. 19,000.00, TV Set make LG valued at Kshs. 28,000, two mobile phones make Samsung valued at Kshs. 12,900. In the course of the robbery, they strangled her with a rope. Her testimony is corroborated with that of PW1, her daughter, who was with her that night and having escaped the house locked it from the outside thus barring the appellant from escaping. The evidence of all the prosecution witnesses was that the appellant was arrested at the scene of crime on the day of the robbery.

25. This account in and of itself is sufficient to prove an offence of robbery with violence under Section 296 (2) of the Penal Code.

26. In Dima Denge Dima & Others Vs. Republic, Criminal Appeal No. 300 of 2007 the Court stressed this point when it stated as follows:

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

27. On the ingredients of the offence, I am satisfied that the Appellant was in the company of three other people when they attacked and robbed Agnes Njeri Mburu. All the elements of the offence are present. There was more than one person and they used physical violence on Agnes Njeri Mburu and robbed her of cash Kshs. 19,000.00, TV Set make LG valued at Kshs. 28,000, two mobile phones make Samsung valued at Kshs. 12,900. It is therefore not true that the ingredients of the offence were not proved beyond reasonable doubt. On my own analysis and consideration, the offence of robbery with violence has been proven beyond reasonable doubt and the conviction by the Trial Court is upheld.

28. On the second issue as to whether there was sufficient evidence linking the Appellant to the offence, identification is crucial in cases of robbery with violence. In Patrick Opondo Opollo & Another v Republic Criminal Appeal No. 23 of 2014, the Court emphasized the need for courts to scrutinize the conditions of identification to ensure its reliability.

29. In Francis Kariuki Njiru & 7 others v Republic Criminal Appeal No. 6 of 2001, the Court of Appeal held that identification evidence must be carefully examined, particularly where the incident occurred at night.

30. In this case, it is evident that the incident occurred at night and that when the police came they had to use torches to light the house as it was dark. Nevertheless, the appellant was arrested at the scene of crime, having been locked in by PW1. Although the robbers had been masked, PW1 positively identified him following his arrest as he had removed the mask and the flash light from the police was powerful enough to light the area. There was compelling evidence of identification which could not be outweighed by the appellant's defence regarding the manner in which he found himself at the scene of crime. Considering the manner and circumstances of his arrest, the prosecution presented sufficient evidence linking the Appellant to the crime, and the trial court did not err in its findings.

31. On the third issue, the Appellant denied involvement and alleged that he was arrested arbitrarily by people he had thought were police on patrol coming to rescue him. However, his defense did not effectively challenge the evidence against him, particularly in light of the positive identification by PW1 and corroborative evidence from PW5. The trial court observed that the prosecution's case remained unshaken by the defense and, held that the defense was a mere denial. The Court of Appeal in David Mwangi Wanjohi & 2 Others v Republic [1989] eKLR emphasized that a mere denial cannot displace strong identification evidence.

32. The trial court carefully evaluated the evidence, and its findings were well reasoned. There was no failure of justice in how the Appellant's defense was handled.

33. On the last issue regarding the sentence, in Mbugua & 9 others v Attorney General & 3 others [2025] KEHC 1248 (KLR), the petitioner questioned the constitutionality of the death sentence under section 296 (2) of the Penal Code the court in held as follows:"

> 48. .As the Petition herein was a subject of Section 296(1) of the Penal Code on the offence of robbery with violence whose mitigating circumstances were impeded by the mandatory nature of sentence under Section 296 (2) of the Penal Code which prescribed death sentence as the only punishment, the mandatory nature of the sentence was unconstitutional as it was discriminative in nature. This Petition therefore constituted a valid challenge as contemplated by the Supreme Court in Muruatetu II.
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> 50. Having taken into consideration the above factors, this court was of the considered view that Sections 296(2) and 297(2) of the Penal Code under which the Petitioners herein were charged and convicted, in so far as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration of the circumstances of the offender, those Sections were deficient as they did not give those administering the justice system unfettered discretion to mete out proportionate sentences depending on the gravity of the offence.
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> 66. To the extent that it was now settled that murder convicts did not suffer death as a mandatory sentence, there was no reason why the persons who had been convicted for the offence of robbery with violence under Section 296(2) and 297(2) of the Penal code had to suffer death as a mandatory sentence. Both offences were capital in nature. The subsisting discrimination

against convicts of robbery with violence offended the provisions of Article 27(1) of *the Constitution* of Kenya.

90. It was therefore discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non- capital offenders enjoy that right. In the words of Article 27(1) of *the Constitution* of Kenya, persons who had been convicted for robbery with violence and attempted robbery with violence were also equal before the law, they have a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders."

34. Given that the trial court imposed a mandatory death sentence, this court must intervene and reconsider an appropriate sentence. This court must therefore re-evaluate the sentence imposed. While the offence of robbery with violence is serious, the appellant's personal circumstances, the time he has served, and the need for rehabilitation must be considered.

35. The principles guiding interference with sentencing by the appellate Court were properly set out in S vs Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

36. Reference is made to the persuasive authority of Justice R. Ougo in Desterious Samuel James v Republic [2025] KEHC 4691 (KLR) where a finding was made that:

> "The mandatory sentence of death prescribed by section 296 (2) of the Penal Code with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is unconstitutional. Consequently, the death sentence against the petitioner is set aside. Petitioner will be allowed to address the court and re-sentencing to determine his appropriate sentence will be done once this court hears his mitigation."

37. From the foregoing, having found that the Trial Court this court arrived at a proper finding on conviction, this court upholds the same.

38. However, the appeal on sentence is allowed by substituting the death sentence with a determinate term of 30 years to run from the date of first custody.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF DECEMBER, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....No Appearance

For Respondent.....Kagema HB Ms Torosi for state.

Court Assistant.....Brian