



**Manya v Republic (Criminal Appeal 174 of 2020)
[2025] KECA 2293 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2293 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 174 OF 2020
DK MUSINGA, PO KIAGE & GV ODUNGA, JJA
DECEMBER 19, 2025**

BETWEEN

MICHAEL OPUKA MANYA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Lenaola & Onyancha, JJ.) dated 29th November 2010 in HCCRA No. 39 of 2008)

JUDGMENT

1. At the start of the hearing of this appeal, Ms. J. Busienei, the learned Assistant Director of Public Prosecutions, gave notice that she would be pressing for the reinstatement of the death sentence previously imposed on the appellant by the Hon. E. Makori (Ag, PM, as he then was) consequent upon his conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code. That sentence was set aside on 29.11.10 by the High Court at Kakamega (Onyancha & Lenaola, JJ. as they then were) and substituted with life imprisonment.
2. In answer to that notice, the appellant's learned counsel, Ms. Ayuko, informed us that the appellant perfectly understood that if he failed to persuade us to quash his conviction, he faced the death sentence, but that he nevertheless wished to urge the appeal. It being a serious matter we sought to hear from the appellant himself and he confirmed what his learned counsel told us.
3. The facts established by the prosecution, and believed by the two courts below, are that on 13.3.1997 at about 7.00pm at Ebusia Village, Malaha Village, East Wanga Location in Wanga District of the then Western Province, Peter Makokha (PW1), a local shopkeeper, had just closed his business and was walking home when he was accosted by two persons. The duo descended on him and beat him up all over the body while demanding money and his mobile phone. He screamed. For some obscure reason the trial magistrate recorded him as saying "I did hurrurate (sic!)" but one of the robbers, whom he



later recognized as the appellant, held him over the head in an effort to strangle him. In the course of the struggle, which PW1 stated lasted about 30 minutes, the appellant rummaged through PW1's pockets and emptied it of his wallet which had Kshs.50 and a receipt for his Motorola 2288 mobile phone, which they also took. The robbers ran away when their victim bit the appellant on a finger of his left hand.

4. Fellow villagers who responded to PW1's screams, including Edward Khasakhala Orata (PW2), Ibrahim Makhoha (PW3) and Anthony Makuna (PW4), all testified that when they followed the noise and came upon PW1, he told them of his ordeal and revealed that he had bitten the finger of one of the assailants who had then run downhill. Downhill these witnesses went and soon came upon two young men, one of whom managed to elude them and escape. The other, who was bleeding from his left hand and appeared to be trembling, was not so lucky. His pockets were searched and yielded a Motorola phone which he attempted to throw away but PW2 retrieved it. These witnesses were neighbours of both PW1 and the appellant, whom they described "as the son of John." They said they knew him since childhood and confirmed that he had visible bite marks on his bleeding finger. As at the time of the trial, the scars left from the alleged bite were till visible on the unfortunate finger.
5. The clinical officer who attended to PW1 is Wycliffe Wechuli, the officer in charge of Makunga Health Centre. He testified as PW5 and stated that on 13.3.2007 he treated the appellant, who had swollen upper limbs with tenderness and bruises at the elbow and knee. His clothes were bloody and he was put on antibiotics and analgesics. PW5 filed a P3 form a week later on 20.3.08, characterizing the injuries as harm caused by a blunt object. He produced the P3 in evidence.
6. PW6, Snr. Sgt. Pius Sifuna investigated the incident and repeated in material terms what the witnesses testified to. He confirmed the arrest of the appellant, who had to be rescued from a mob intent on beating him for the robbery, while his accomplice managed to escape and was still at large. The mobile phone stolen from the complainant was recovered from the appellant, who laid no claim to it, while the complainant was able to identify it by the mark of his name on it. This mark was also confirmed by PW2.
7. When placed on his defence, the appellant said in an unsworn statement that he was near the road at 8.30pm when "so many people whom [he] knew" attacked and beat him claiming that he was one of the thugs who had stolen. He lost consciousness and came to three days later at the District Hospital. He was later charged with robbery with violence and did not understand why his neighbours framed him for the robbery.
8. The appellant's appeal is captured in his self-authored memorandum of appeal in which he complains that;
 - "1. That the honourable Judges erred in law and in fact in finding the appellant guilty of the offence of robbery with violence yet he charge was not proved beyond reasonable doubt.
 2. That the honourable Judges erred in law and in fact in finding that the prosecution proved its case beyond reasonable doubt.
 2. That the honourable Judges misdirected themselves in convicting the appellant based on dock identification.
 3. That the honourable Judges erred in law and fact in upholding the lower court's decision without considering the fact that the appellant was never identified.
 4. That the honourable Judges erred in law and in fact in disregarding the appellant's evidence and testimony while delivering his judgment.



2. That the honourable Judges erred in law and in fact in convicting the appellant based on circumstantial evidence yet the same was not proven beyond reasonable doubt.
 3. That the honourable Judge erred in law and in fact in sentencing the appellant to life imprisonment yet the prosecution did not prove its case beyond reasonable doubt.”
9. This being a second appeal, we are statutorily barred from a consideration of matters of fact by section 361 of the Criminal Procedure Code. In so far as the appellant purports to raise errors of “law and fact,” we shall ignore the factual aspects of the raised grounds. Nonetheless, we think that the appeal turns on whether the appellant was properly identified as one of the robbers and or whether the doctrine of recent possession was properly relied on by both courts below to found his conviction. Starting with identification, the appellant asserts in his written submissions that the two courts below did not apply the proper legal principles before concluding that he was properly identified as one of the robbers. Citing *MAITANYI Vs. REPUBLIC* [1986] KLR 198, he faulted the two courts for not testing the identification evidence with greatest case and for not warning themselves on the dangers of relying on the identification evidence of a single witness. He also relied on *Etole & Anor Vs. Republic* [2001] eKLR to urge that the courts failed to remind themselves that mistakes in identification do occur that bring about a miscarriage of justice.
10. Whereas it is true that the two courts below did not expressly warn themselves on the need for carefully interrogating the evidence relating to identification, the circumstances of this case did not solely rely on usual identification or recognition as such. The complainant’s testimony was that he did not at first know the person who attacked him. However, he was very clear that one of them did take his mobile phone, and that he did bite the finger of that particular robber. After he raised alarm and shouted Thief! Thief! fellow villagers immediately came to the road and it is there that PW2, PW4 and PW5 spotted a person, who turned out to be the appellant, running downhill. On being stopped and searched, he was found to be in possession of the complainant’s mobile phone which he attempted to throw away. More tellingly, he had a still-bleeding bite wound on his finger. These circumstances of the appellant being caught moments after the robbery, a short distance from the scene and in possession of the stolen phone while nursing a bitten bleeding finger are the ones which, taken together, led to the logical and inescapable conclusion that he was one of the robbers. He was unable to explain his possession of the phone with the appellant’s name, nor could he say how, if not by the bite of the complainant, he came to be having a bitten finger. It was on the basis of recent possession mainly that he was found guilty of the offence and we are ourselves well-satisfied that the doctrine of recent possession was properly applied to the case. The doctrine is a commonsensical one and its applicable elements have been restated in many cases including in *ERIC OTIENO ORUM Vs. REPUBLIC* [2006] eKLR, cited by Ms. Busienei, in which this Court expressed them thus, and we agree:

In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:

- i. first; that the property was found with the suspect;
- ii. secondly; that the property is positively the property of the complainant;
- ii. thirdly; that the property was stolen from the complainant; and
- ii. lastly; that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”



11. The post-facto identification by recognition of the appellant by several witnesses including PW1, PW2, PW3 and PW4, who all referred to him by name, stated that he was a neighbour, the son of John, and that they had known him for many years, including since childhood, all go to show that the finger-bleeding thug who was found with PW1's phone, downhill from where he had been attacked moments before, was indubitably one of the robbers. It is telling that in his unsworn statement the appellant most gratuitously placed himself within the vicinity of the incident at the material time. We are satisfied that the two courts below properly directed their minds to the evidence and their concurrent findings on the guilt of the appellant are unassailable. His conviction was safe.
12. That now leaves us with the sentence. While the trial magistrate sentenced the appellant to suffer death as provided by law, the learned Judges of the High Court, upon upholding his conviction, faulted him in the following terms;

As to sentence, we in the advent of the new constitution find that an accused person should be given opportunity to plead for a lesser sentence other than death which is the maximum sentence provided. In this case the appellant had pleaded for mercy but the trial court believed that there was no other lesser sentence available to him to consider. He did not accordingly even think of giving a chance to the other possible sentence such as the imprisonment. The trial court was accordingly in error on that aspect. We could sent this case back to the trial court to consider, if appropriate, a possibility of awarding a life sentence. However, we consider that we will take time. We accordingly order a life sentence instead of death sentence given by the trial magistrate. In doing so, we also observe that the death sentence has been abolished by the New Constitution. We make orders accordingly.”

13. With respect, we perceive this to be a misdirection. In particular, it is incorrect to state, as did the learned Judges, that the death sentence was abolished by the new Constitution. It was not. To the contrary, Article 26 (3) did save the death penalty where authorised by *the Constitution* or any other written law. We are cognizant that the learned Judges expressed their opinion a mere three months into the then very new Constitution and the issue was yet to be litigated thereunder. In FRANCIS KARIOKO Muruatetu & Another Vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2017] KESC 2 (KLR) (MURUATETU 1) the Supreme Court did rule to be unconstitutional, not the death penalty per se, but only the death sentence when expressed as a mandatory sentence in the case of murder. Subsequent clarification by the apex court in Francis Karioko Muruatetu & Another V Republic; Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31 (KLR) [muruatetu 2] has limited the unconstitutionality of the mandatory sentences to murder only, with the effect that mandatory sentence for robbery with violence and other offences have been expressed to be lawful.
14. Inevitably, we find and hold that the learned Judges were in error to set aside the death sentence and substitute it with a term of life imprisonment, which we accordingly set aside and reinstate the sentence of death first and properly imposed by the trial magistrate.
15. Ultimately, the appeal fails and is dismissed with the sentence being corrected to death in accordance with the notice and warning given, but spurned by the appellant.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL



P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

