



**Otieno alias Monya & another v Republic (Criminal Appeal  
E030 of 2021) [2025] KECA 2271 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2271 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E030 OF 2021  
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
DECEMBER 19, 2025**

**BETWEEN**

**WASHINGTON OTIENO ALIAS MONYA ..... 1<sup>ST</sup> APPELLANT**

**PETER MAKOKHA JUMA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of the High Court of Kenya at Bungoma  
(L. Achode, J.) dated 18<sup>th</sup> December, 2018 in HCCRA. No. 165 of 2016)*

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> appellants were charged alongside four other co-accused persons before the Chief Magistrate's Court at Bungoma with three counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The particulars of the offence in Count I alleged that on 8<sup>th</sup> May, 2013, at Mashambani Village, in Bungoma South District, within Bungoma County, the appellants, jointly with others not before court, being armed with offensive weapons namely pangas, runkus and machetes, robbed one Irene Nyongesa of cash Kshs.100,000, mobile phone make Nokia 100 valued at Kshs.1,900, and immediately before the time of such robbery used actual violence to the said Irene Nyongesa.
3. In count II, on the same date and place, and while armed with offensive weapons namely pangas, runkus and machetes, the appellants were alleged to have robbed one Timothy Nyongesa of one mobile phone make Nokia X2-02 valued at Kshs.5,500, and at or immediately before the time of such robbery used actual violence that caused fatal injuries to the said Timothy Nyongesa.
4. In count III, on the same date and place, and while armed with offensive weapons namely pangas, runkus and machetes, the appellants were alleged to have robbed one Lilian Nyongesa two mobile



phones make Nokia 5130 valued at Kshs.8,500, and at the time of such robbery used actual violence on the said Lilian Nyongesa.

5. It was the prosecution's case that on 8<sup>th</sup> May, 2013, at about 7.00 p.m., PW1, Irene Nyongesa, was at home with her children, Lilian Nyongesa (PW3), Isaiah Nyongesa (PW4), and John Nyongesa (PW6). Her husband, Timothy Nyongesa (deceased) came back home from Kisumu, accompanied by his driver, one Douglas Wafula (4<sup>th</sup> accused person). PW1 stated that she was in the kitchen when he arrived. She then saw her daughter run out of the house. Immediately thereafter, a man who had light-skinned complexion, wearing a black T-shirt, a hat and gumboots, came to the kitchen and ordered her to lie down. She stated that he was carrying a rungu and a torch. He hit her with a stick. She fled using the back door of the kitchen. Outside, she met another assailant who hit her with a rungu. He dragged her back to the house. She stated that the second assailant, who she identified as the 1<sup>st</sup> appellant, was known to her. She testified that the 1<sup>st</sup> appellant hit her again on her left arm and broke her hand. He dragged her to the living room, where she found two assailants who had rounded up her children.
6. Through a window, PW1 stated that she saw four other assailants attacking her husband with swords, pangas and rungu. The 1<sup>st</sup> appellant informed her that they had come to collect Kshs.100,000 from her husband. He dragged her to the bedroom where she removed the money (Kshs.80,000) from behind the mattress and gave it to him. They went back to the living room where the assailants started fighting amongst themselves for a share of the money. In the midst of the melee, she managed to escape, but was attacked by another assailant at the gate. PW1 sustained injuries to her hand and arm. Other than the money, the robbers stole her phone, make Nokia 110, two mobile phones belonging to her husband, also make Nokia, and PW3's phone, make Nokia 5130. PW1 stated that, with the help of PW6 and the neighbours, her husband was taken to Mt. Elgon View Hospital, while her daughter (PW3) and herself received treatment at St. Domiano Hospital. She was later informed that her husband had succumbed from the injuries sustained during the robbery.
7. The police conducted an identification parade where PW1 was able to identify the 2<sup>nd</sup> appellant. She stated that the 1<sup>st</sup> appellant was well known to her, for close to two years prior to the robbery incident. PW3 told the court that she identified both appellants, as there was electric light in the living room where the assailants had detained them. It was her testimony that the 2<sup>nd</sup> appellant, whom she picked out in an identification parade, was among the assailants who attacked her father, while the 1<sup>st</sup> appellant was the one who dragged her mother from the kitchen to the living room. PW3 stated that she knew the 1<sup>st</sup> appellant as he worked in a nearby hotel. PW6, on his part, stated that he was able to identify the 2<sup>nd</sup> appellant as the man who tried to break into his house. He stated that the 2<sup>nd</sup> appellant wore a marvin and a rain coat, and that he picked him out of an identification parade conducted by the police.
8. PW5, SSP Bernard Barasa, was among the officers tasked with tracking the stolen mobile phones. It was his evidence that one of the phones (Nokia X2-02) was recovered from one of the appellants' co-accused, Daniel Aluku Wafula. PW3's phone was traced to the 2<sup>nd</sup> appellant. It was his testimony that the 2<sup>nd</sup> appellant was, at first, unable to explain how he came to be in possession of the stolen mobile phone, but that he later confessed that he collected it from the scene of crime.
9. PW2, Ronald Ndinda, was found in possession of a mobile phone, make Nokia 5130, which was stolen from PW3. It was his evidence that he got the phone from the 2<sup>nd</sup> appellant, as collateral for a loan of sum Kshs.1,500 that he had extended to the 2<sup>nd</sup> appellant. He led the police to the arrest of the 2<sup>nd</sup> appellant. PW7, Philip Kosgei, from Bungoma District Hospital produced P3 forms with respect to PW1 and PW3, as well as a post mortem report relating to Timothy Nyongesa (deceased). He testified that the injuries sustained by PW1 on her head and arm, as well as those sustained by PW3 on her head and eye, were classified as grievous harm. It was his evidence that Timothy Nyongesa sustained bruises



- on his abdomen, head and stomach, a cut wound extending from back of his head up to the center of his head, several other cut wounds on his head, and a fracture of the skull. His cause of death was determined as cerebral hemorrhage, secondary to severe head injury.
10. The investigating officer, Senior Sergeant Linus Ouma (PW8), told the trial court that he visited the scene of crime on 8<sup>th</sup> May, 2013, at 8.00 p.m., after a report of the robbery was made. At the scene, he was informed that the complainants had been rushed to hospital. He visited Bungoma District Hospital and was informed that Timothy Nyongesa had died. At St. Domiano Hospital, he was able to record the statements of PW1 and PW3 while they were undergoing treatment. It was his testimony that PW1 identified the 1<sup>st</sup> appellant by name. He stated that he arrested the 1<sup>st</sup> appellant at a hotel located close to the scene of crime. The 2<sup>nd</sup> appellant was arrested with the help of DCI officers who tracked the mobile phones stolen from the complainants. He stated that an identification parade was conducted with respect to the 2<sup>nd</sup> appellant, and that he was identified by PW1, PW3 and PW6.
  11. The appellants were placed on their defence. The 1<sup>st</sup> appellant (DW1) gave sworn statement. It was his testimony that he was at a hotel where he worked on 9<sup>th</sup> May, 2013, when police officers came and arrested him. He denied the charges against him, and stated that he was at work on the material date of the robbery incident. He availed his mother, Rosemary Ngesa (DW10) as a witness. She told the court that the 1<sup>st</sup> appellant was working at the hotel on 8<sup>th</sup> May, 2013, and that they left together at about 7.00 p.m., and went home. In effect, the 1<sup>st</sup> appellant was adducing an alibi defence.
  12. The 2<sup>nd</sup> appellant (DW3) also gave sworn evidence. It was his evidence that he was arrested on 15<sup>th</sup> May, 2013, while on his way from Kakamega District Hospital. He denied being part of the gang that committed the robbery. He stated that he did not recall where he was on the date of the robbery incident.
  13. At the conclusion of the trial, the trial magistrate found the appellants guilty as charged on all three counts. Upon conviction, the appellants were sentenced to death in Count I, while the sentences in Count II and III were held in abeyance. Their co-accused persons were acquitted.
  14. Dissatisfied by the decision of the trial court, the appellants lodged their respective appeals before the High Court at Bungoma, challenging both their conviction and sentence. Their appeals were based on grounds that: they were not accorded a fair trial guaranteed under Article 50 of *the Constitution*; the evidence adduced by the prosecution witnesses was false and inconsistent; the evidence of identification was unreliable; their identification amounted to dock identification and therefore not credible; and that their defence statements were improperly rejected.
  15. The first appellate court (Achode, J) (as she then was) having heard the appeal, dismissed the same on both conviction and sentence. The learned Judge found that the appellants were positively identified as being part of the gang that attacked and robbed the complainants.
  16. The appellants are now before us on second appeal. Their respective appeals challenge both conviction and sentence, on grounds that the 1<sup>st</sup> appellate court erred in law: by failing to find that their right to a fair trial guaranteed under Article 50(2)(h) of *the Constitution* was violated; by failing to consider the 1<sup>st</sup> appellant's alibi defence; and by failing to consider the appellants' mitigation, hence imposing a sentence that was harsh and manifestly excessive.
  17. During the plenary hearing of the appeal, Counsel for the appellants, Mr. Ouru submitted that the appellants were not accorded legal representation during trial, which went against the provisions of Article 50(2)(h) of *the Constitution*. It was his submission that the appellants were not informed of their right to have an advocate assigned to them by the State, despite having been charged with a capital



offence, which amounted to substantial injustice. He submitted that the 1<sup>st</sup> appellant, through the evidence of his witness, DW10, raised an alibi defence, which was neither investigated, nor rebutted by the prosecution. As such, he was of the view that the prosecution failed to discharge its burden of proof with respect to the charge against the 1<sup>st</sup> appellant. Regarding sentence, counsel urged that mandatory death sentence was outlawed by the decision of the apex court in Francis Karioko Muruatetu v. Republic [2017] eKLR. He urged us to consider the appellants' mitigation, as well as time spent in remand custody, and reduce the sentence imposed by the trial court.

18. Ms. Mwaniki, Learned Senior Assistant Director of Public Prosecution, in rebuttal, opined that the appellants were properly identified by the prosecution witnesses, and placed at the scene of crime. She submitted that the 1<sup>st</sup> appellant's identification was by recognition, while the 2<sup>nd</sup> appellant initial identification was confirmed in a later identification parade, and in addition, his conviction was also based on the application of the doctrine of recent possession. On sentence, Ms. Mwaniki was of the view that the sentence imposed by the trial court was lawful, and commensurate with the seriousness of the offence.
19. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See *Kaingo v. Republic* [1982] KLR 213.
20. We have carefully considered the record of appeal, the submissions by both parties, and the law. In their first ground of appeal, the appellants urged that their right to a fair trial, guaranteed by Article 50(2)(h) of *the Constitution* was violated, as they were not informed of their right to have free legal representation accorded to them by the State. This was in light of the fact that they were charged with a capital offence.
21. Article 50 (2) of *the Constitution* provides thus:
  - (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 this right promptly; (emphasis ours).
22. It is prudent that in every criminal trial, an accused person is informed of their right to legal representation as mandated by *the Constitution*. The definition of what constitutes 'substantial injustice' is not given in *the Constitution*. This Court in the case of *David Njoroge Macharia v Republic* [2011] eKLR observed as follows:

“We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”



23. In the instant case, we note that the question of provision of legal representation was raised by the appellants for the first time in this second appeal. It was not raised before the High Court, and cannot therefore form basis of vitiating the decision of the first appellate court. We are guided by the decision of the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)* where the Court held thus:

“Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent’s sentence was also not raised either before the trial court or the High Court. The Respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.”

24. Be that as it may, a perusal of the record of the trial court showed that the appellants indicated that they were ready to proceed with the trial, after being furnished with the witnesses’ statements. They actively participated in the trial and cross-examined all the witnesses. They were not restricted at all by the trial Court in the manner they chose to conduct their defence. It was not therefore not apparent from the record that they suffered any substantial injustice for lack of legal representation as the appellant would want us to believe. That ground of appeal must fail.

25. The second issue for determination in this appeal is whether the 1<sup>st</sup> appellant’s alibi defence was properly considered by the first appellate court. The 1<sup>st</sup> appellant urged that he raised an alibi defence through his witness, DW10, and that the prosecution failed to rebut this alibi. This Court in *Kimotho Kiarie v Republic [1984] eKLR* observed as follows with respect to an alibi defence:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

26. In this case, the appellant raised an alibi defence during his defence. He told the court that he was working at his mother’s hotel on 8<sup>th</sup> May, 2013. His mother, Rosemary Ngesa (DW10) testified that she was with his son at Anyole Hotel on 8<sup>th</sup> May, 2013, from 7.00 a.m. to 7.00 p.m. It was her evidence that at 7.00 p.m., they closed the hotel and went home together.

27. It is our considered view that the prosecution’s evidence was cogent, credible and consistent and therefore dislodged the appellant’s alibi defence. PW1 and PW3 placed the 1<sup>st</sup> appellant at the scene of crime on the material night. The 1<sup>st</sup> appellant was well known to them. They stated that they had known the appellant for three years prior to the robbery incident, having interacted with him at the nearby hotel where he worked. He went by the nickname “Minyo”. PW1 and PW3 identified him by name. PW1 stated that the 1<sup>st</sup> appellant attacked her as she tried to escape from the scene of crime, and dragged her back to the house. He took her to the living room where she found her children being detained, having been subdued. She stated that there was electric light in the living room, and that it was the 1<sup>st</sup> appellant who informed her that they had come to collect Kshs.100,000 they believed was in the house. He escorted her to the bedroom where she retrieved the money and gave it to the 1<sup>st</sup> appellant. This evidence was corroborated by PW3.

28. The 1<sup>st</sup> appellant’s identification was by recognition. This Court in the case of *Anjononi & Others v Republic [1980] KLR 59*, emphasized that recognition by someone known to an accused is more



reliable than identification of strangers. The evidence by the prosecution witnesses established that there was sufficient light at the scene of crime which enabled PW1 and PW3 positively identify the 1<sup>st</sup> appellant. The incident happened in close proximity to the two identifying witnesses. We are therefore satisfied that there was no chance of mistaken identity. We find that the two courts below properly considered and rejected the 1<sup>st</sup> appellant's alibi defence, having weighed the same against the weight of the prosecution evidence.

29. As regards the 2<sup>nd</sup> appellant, other than the evidence of identification, the prosecution adduced additional evidence in form of the recovery of the mobile phone in his possession so soon after the incident that was robbed from one of the complainants. The 2<sup>nd</sup> appellant's identification by PW1, PW3 and PW6 was confirmed in an identification parade later held by the police. We have no reason in law to disagree with the concurrent verdicts by the two Courts below that the 2<sup>nd</sup> appellant's identification was watertight and further that by the application of the doctrine of recent possession he was placed at the scene of crime when the robbery occurred.
30. The last issue is whether the sentence imposed to the appellants was harsh and manifestly excessive. Upon conviction by the trial court, the appellants were sentenced to death in count I, while the sentences in the remaining two counts were held in abeyance. The death sentence is the penalty prescribed by Section 296(2) of the Penal Code. The appellants urged that the Supreme Court in Francis Karioko Muruatetu v. Republic [2017] eKLR declared that the mandatory death sentence is unconstitutional. They urged us to consider their mitigating circumstances, and reduce the sentence awarded by the trial court.
31. We find it prudent to point out that the Muruatetu decision (*supra*) did not outlaw the death penalty which is still applicable as a discretionary maximum sentence under Section 204 of the Penal Code. Further, the Supreme Court has since clarified that their decision in the Muruatetu case only related to the mandatory death sentence prescribed for murder cases under Section 204 of the Penal Code, and did not apply to any other statutory mandatory death sentences or mandatory minimum sentences. See *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)*.
32. We further noted the aggravating circumstances in this case.  
  
The appellants, during the robbery, attacked PW1, PW3 and Timothy Nyongesa(deceased) with pangas and rungs. PW1 and PW3 sustained serious injuries which were classified as grievous harm. They were admitted at the hospital where they received medical treatment. Timothy Nyongesa unfortunately sustained fatal injuries. According to the post mortem report, he sustained bruises on his abdomen, head and stomach, a cut wound extending from the back of his head up to the center of his head, several other cut wounds on his head, and a fracture of the skull. His cause of death was determined to be cerebral hemorrhage, secondary to severe head injury. The deceased suffered a painful death. The violence occasioned upon the complainants by the appellants was vicious, brutal and utterly unnecessary in the circumstances.
33. In view of the foregoing, and considering the circumstances of this case, we find that the death sentence meted by the trial court, and affirmed by the High Court was sound in law, and commensurate with the offences committed.
34. In the end, the appellants' appeal on both conviction and sentence fails. We hereby order that their respective appeals be dismissed.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2025.**

**ASIKE-MAKHANDIA**



**JUDGE OF APPEAL**

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**H.A. OMONDI**

**JUDGE OF APPEAL**

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**L. KIMARU**

**JUDGE OF APPEAL**

I certify that this is a true copy of original.

**DEPUTY REGISTRAR.**

