



**Onditi v Republic (Criminal Appeal 289 of 2019)
[2024] KECA 1817 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1817 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 289 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
DECEMBER 20, 2024**

BETWEEN

DOMINIC ONDITI ONDITI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Kisii
(Sitati & Maina, JJ.) dated 24th July, 2014 in HCCRA No. 40 of 2011)*

JUDGMENT

1. Dominic Onditi Onditi, the appellant herein, was charged before the Principal Magistrate's Court at Ogembo with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on 17th July, 2010 at Gatenga Sub-location in Gucha District within Nyanza province, jointly with others not before the court, he robbed John Omare Nyamao of cash Kshs. 11,800/=, Equity Bank ATM Card, a mobile phone make Safaricom Kabambe, and a National Identity Card number 13XXXX79 all valued at Kshs. 14,799/=, and at or immediately before, or immediately after the time of such robbery, he used actual violence against the said John Omare Nyamao.
2. The appellant pleaded not guilty to the charge. Following a trial in which six witnesses testified for the prosecution, and the appellant gave an unsworn statement in his defence, the trial magistrate found the appellant guilty of the offence, convicted him and sentenced him to death.
3. Dissatisfied with the outcome of his trial, the appellant appealed to the High Court which, upon considering the appeal, upheld both the conviction and sentence. Undeterred, the appellant lodged an appeal in this Court initially challenging the findings of the learned Judge of the High Court on both conviction and sentence. Subsequently, the appellant filed supplementary grounds of appeal dated 21st May, 2024, in which he indicated that his appeal was against the sentence only.



4. During the hearing of the appeal, the appellant was represented by Mr. Nyakeriga who had filed written submissions in support of the appeal against both conviction and sentence. The appellant, however, insisted that he was pursuing the appeal against sentence only, and, therefore, the appeal against conviction was abandoned.
5. The facts leading to the appellant's conviction were as follows: On 17th July, 2010 at about 6:30pm, the complainant, John Omare Nyamao (John), was on his way home when he was accosted by three people. They beat him up and ransacked his pockets. John identified one of the assailants as the appellant, a person who was well known to him.
6. Finley Shem Onchieku (Onchieku) was at that particular time, passing by, when he noticed the complainant had fallen down and was being beaten by the three people. He was at a distance of about 10 meters when he identified the appellant as one of the assailants. Onchieku screamed and the three assailants fled, taking with them KShs.11,800/-, a Safaricom mobile phone, John's ATM Card, Identity Card and a wallet, which they had snatched from John. The matter was reported to the Assistant Chief and then to Ogembo Police Station.
7. On the same day, at about 6.30pm, Evans Ochari was going home from his place of work when he saw a Safaricom wallet. Inside the wallet was an identity card and an ATM Card. He left the items with Zachary Miruka, who identified the owner of the documents as John who is his uncle's son. He called John who collected the items from him.
8. John was subsequently examined by Joseph Mokuia Nyangau, a Clinical Officer at Gucha District Hospital, who confirmed that he had lacerations at the neck region, the anterior chest wall and the posterior back region, and that the injuries were caused by both sharp and blunt weapons.
9. On 21st August, 2010, John took Corporal Richard Muteti Muindi (Cpl. Muindi) of Barainne Police Post, to the house of the appellant. Cpl. Muindi arrested the appellant and took him to the police station where he was subsequently charged with the offence.
10. Upon convicting the appellant the trial magistrate sentenced him to death, stating as follows:

“Mitigation considered, also considered is the fact that accused herein is a first offender, I am also aware to the recent case wherein the Judges of the High Court held that the death sentence is not the only available sentence; however, the law still remains that the person convicted of an offence of robbery with violence contrary to Section 296(2) of the Penal Code shall be sentenced to suffer death, in the premises then, I proceed to sentence the accused person to suffer death as prescribed by law.”
11. In his appeal before the High Court, the appellant filed a petition of appeal with five grounds. Subsequently, an amended petition was filed by his advocates, Ombuhi K. Mogire advocate, wherein sixteen grounds were raised. We notice that all the grounds in the original petition of appeal, and the amended petition of appeal, all addressed the issue of conviction. Therefore, the appellant did not appeal against sentence in the High Court. It is not surprising that the High Court in its judgment, did not address the issue of sentence.
12. This being a second appeal, the jurisdiction of this Court is limited to matters of law only. Section 361(1) of the Criminal Procedure Code states:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—



- a. On a matter of fact, and severity of sentence is a matter of fact; or
 - b.] Against sentence, except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence.”

13. The appellant’s appeal before us is limited to the issue of sentence only. The grounds which the appellant has posited in this regard are as follows:
 - “(i) That this appeal is against sentence only.
 - ii. That the mandatory death sentence imposed against the appellant is unconstitutional which deprived the appellant’s right to a fair trial under Article 259(c) thus seeking for appropriate sentence(sic).
 - ii. That the appellant herein requests this Honourable Court to consider Section 333(2) of the Criminal Procedure Code when determining the sentence by considering the period spent in custody since his arrest relying in the case of Ahamed Abolfadhi Mohammed & another -vs- Republic [2018] eKLR.”

14. We have considered this appeal in light of the record of appeal, the submissions made by counsel, the authorities cited and the law. The appellant’s appeal against sentence has two stumbling blocks. First, is this Court’s jurisdiction to consider the appeal against sentence. In Bernard Kimani Gacheru v Republic (2002) eKLR, the Court stated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material fact, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”

15. Sentencing is a matter that falls within the discretion of the trial court. It is also a matter of fact that can only be considered by this Court on a second appeal in the circumstances subscribed under section 361(1) of the Criminal Procedure Code. We do not find any matter that brings the appellant’s appeal under our circumscribed jurisdiction as afore stated. The appellant having been convicted of the offence of robbery with violence contrary to section 296(2), he was sentenced to death, which is the mandatory statutory sentence provided under that section. The trial magistrate cannot be faulted for imposing the death sentence, because as stated in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR):

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law.”

16. The second hurdle, is the fact that before the High Court, the appellant did not appeal against sentence. Therefore, the High Court has not rendered itself on the issue of the constitutionality of the death sentence that was imposed upon the appellant. The appellant cannot now raise this issue before us for



the first time. As stated by the Supreme Court in Republic -vs- Mwangi (supra), such an issue must be raised and fully argued in the High Court, before it can be escalated to this Court.

17. For these reasons the appellant's appeal fails. and is accordingly dismissed.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

