



REPUBLIC OF KENYA



KENYA LAW
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**Omondi v Republic (Criminal Appeal 192 of 2016)
[2022] KECA 1069 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1069 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 192 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 7, 2022**

BETWEEN

DAVID OBADE OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (C. B Nagillah and D. S. Majanja, JJ) dated 22nd May, 2015 in HCCRA NO. 98 of 2014)

JUDGMENT

1. This is a second appeal by the appellant, David Obande Omondi, against his conviction for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The information against him before the trial court stated that on the 9th day of November, 2011 at Waragi Village, Waware North Sub-location, Rusinga East Location in Mbita District within Homa Bay County, being armed with a dangerous weapon namely a knife, he robbed Stephen Ochieng Omwonya of a Nokia phone valued at Kshs. 3000 and immediately before or immediately after the time of such robbery wounded the said Stephen Ochieng Omwonya. The appellant was tried before the Chief Magistrate's Court in Homa Bay, convicted, and sentenced to death.
2. Dissatisfied with both his conviction and sentence, the appellant appealed to the High Court sitting in Homa Bay. In its judgment dated 22ND May 2015, the High Court (Nagillah and Majanja JJ) dismissed his appeal and upheld both his conviction and sentence.
3. The appellant has now filed the present appeal before this Cour. He raises two grounds of appeal in the Supplementary Memorandum of Appeal dated 8th March, 2021 namely that:



- i. The learned trial and superior Courts erred in law in convicting the appellant with robbery with violence when the entire trial lacked all the ingredients of a fair hearing as per Article 50 of *the Constitution* of Kenya.
 - ii. That the learned trial and superior courts erred in law when they convicted, sentenced subsequently affirmed respectively the appellant to suffer death. (sic)
4. Briefly, the facts before the trial court were that the complainant (PW1) Stephen Ochieng Omwonya, was a motorbike rider. On 9th November 2011 at about 7.40pm, he was at Mbita Town when the appellant requested to be taken to a funeral at Kamgere. As they approached Kamgere Primary School, the appellant told the complainant to stop as the road ahead was muddy. The appellant paid the fare with some coins and as the complainant counted them with the aid of the motorcycle headlights, he felt the appellant stab him on the back with a knife. The appellant held the complainant but he ran away, leaving behind his jacket, which also had his mobile phone. The complainant immediately ran to a nearby home. When he went back, he did not find his Nokia mobile phone valued at Kshs. 3,000. He reported the matter at Mbita Police Station and then went for treatment.
5. On 10th November, 2011, the complainant reported the incident to Elias Ochieng Ogutu, the chairman of the motorbike riders in Mbita. Since he knew the appellant, he caused him to be arrested.
6. Duncan Odhiambo Aloo (PW3), a clinical officer at Mbita District Hospital, examined the complainant 12 hours after the incident and noted that he had a stab wound at the back side of the chest, which he classified as harm. The investigating officer, Corporal John Kehara, had received the report of the incident from the complainant while on duty at the Mbita Police Station on 9th November 2011 at about 8 pm. The complainant reported that he had been robbed by the appellant. PW4 noted that the complainant was dressed in a blood stained vest and had a stab wound.
7. In his appeal before the High Court, the appellant alleged that his conviction was based on insufficient evidence identifying him as the person involved in the robbery; and that there was a grudge between him and the complainant.
8. The High Court, however, found no merit in the appeal. It found that the case against the appellant was proved beyond reasonable doubt; and that the case was one based on recognition, not identification. The first appellate court noted the evidence of the complainant that he had known the appellant for a long time; that he had given the appellant the motor bike to use when he bought it; that the complainant and the appellant had met earlier that night in an area where there was a security light, discussed the trip, agreed on the fare and proceeded for some distance.
9. Further, the complainant had reported the incident to the police and to the chairman of the motorbike riders that very night and had identified the appellant as the assailant. While the appellant had alleged that there was a grudge between him and the complainant, he had not raised the issue in his cross-examination of the complainant or the chairman of the motorbike riders. Further, that the allegation that there was a grudge was inconsistent with the appellant's defence that he did not know the complainant.
10. At the hearing of the appeal before this Court, Ms. Anyango, holding brief for Mr. Mirembe for the appellant, relied on written submissions dated 25th March, 2021. It is contended in these submissions that from the record of appeal, there is no indication that the appellant was charged with a capital offence. Further, that there is no indication that the appellant was ever supplied with the documents and evidence that the prosecution intended to rely on contrary to the provisions of Article 50(2)(j) of



the constitution on fair trial. The appellant relies on the case of Thomas Patrick Gilbert Cholmondeley vs Republic (2008) eKLR in support of this submission.

11. It is further submitted for the appellant that his conviction and sentence are inconsistent with the Constitution. The appellant relies in support on the case of David Mwangi Mugo v Republic [2011] eKLR and Godfrey Ngotho Mutiso vs Republic Criminal Appeal No. 17/2008 (UR) in which this Court considered and held the mandatory nature of the death penalty unconstitutional. The appellant urged us to remit the matter to the High Court for re-sentencing.
12. In her response on behalf of the State, Ms. Vitsengwa, learned Prosecution Counsel, submitted that there had been no violation of the appellant's rights under Article 50 of the Constitution as the said Article had been strictly adhered to. Further, the appellant did not raise the issue of not being supplied with the documents to be relied on, either before the trial court or at the High Court.
13. Regarding sentence, it was the submission of the State that the death penalty is legal, it remains in the Penal Code as the sentence for robbery with violence, and this Court should not interfere with it. Ms. Vitsengwa submitted further that the decision in Francis Karioko Muruatetu & Anor v Republic [2017] eKLR (Muruatetu 1) does not apply to robbery with violence and the death sentence meted out is legal.
14. This is a second appeal and the Court is therefore, in accordance with the provisions of section 361(a) of the Criminal Procedure Code, confined to a consideration of issues of law-see Karani vs. R [2010] 1 KLR 73.
15. The appellant has challenged his conviction on the basis that it was in violation of his rights under Article 50. However, as submitted by Counsel for the State and conceded by Ms. Anyango for the appellant at the hearing before us, this issue was not raised before the trial court, nor was it a ground of appeal before the High Court. The appellant is, accordingly, precluded from raising it before us in this appeal.
16. The sole question of law properly before us, which we have duly considered, relates to the appellant's challenge of the death sentence imposed upon him, which both the trial court and the first appellate court found to be the sentence prescribed by law.
17. In its decision in Muruatetu 1, the Supreme Court held that the mandatory nature of the death sentence imposed upon a conviction for the offence of murder contrary to section 203 of the Penal Code is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. However, in Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), the Court issued directions to the effect that the decision was to apply only to the offence of murder under section 203 and 204 of the Penal Code and not to mandatory sentences generally. The Supreme Court stated as follows:
 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the



mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.

18. We are bound by the directions of the Supreme Court and are accordingly unable to interfere with the sentence imposed on the appellant.
19. However, while this Court is precluded by these Directions and the binding nature of judicial precedents from entering into a consideration of whether the death penalty for the offence of robbery with violence is unconstitutional, the appellant and others similarly situated are at liberty to approach the High Court to seek appropriate orders in the manner directed by the Supreme Court. In so far as appropriate orders in that regard have not been obtained with respect to the sentence for the offence of robbery with violence, we find our hands tied with respect to the sentence in the appeal before us. The appeal is accordingly dismissed.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

