



**Onyango & 5 others v Republic (Criminal Appeal 130, 150 & 151 of 2015  
(Consolidated)) [2022] KECA 1080 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1080 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 130, 150 & 151 OF 2015 (CONSOLIDATED)  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**WYCLIFF OTIENO ONYANGO ..... 1<sup>ST</sup> APPELLANT  
ELVIS OCHIENG MUMBO ALIAS MACHUTHA ..... 2<sup>ND</sup> APPELLANT  
GABRIEL OTIENO ONYANGO ..... 3<sup>RD</sup> APPELLANT  
PIUS OWINO OGINGA ..... 4<sup>TH</sup> APPELLANT  
KENNEDY OCHIENG KISAKWA ..... 5<sup>TH</sup> APPELLANT  
TOM OTIENO APUNDA ..... 6<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Homabay  
(Majanja, J.) dated 24th April, 2015 in HCCRC No. 9 of 2012)*

**JUDGMENT**

1. The appellants were charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that on the 21<sup>st</sup> day of May, 2012 at Ngera Village in Suba District within Homabay County in the Republic of Kenya, jointly with others not before court they murdered Emmanuel Ochieng Odeny (deceased).
2. The appellants denied the charge leading to a trial in which the prosecution called 10 witnesses in support of its case. Evidence was adduced to the effect that on 21<sup>st</sup> May 2012, at around 10am, Stephen Odhiambo Odeny (PW1), a brother to the deceased was at home washing clothes when he saw 8 people approach the deceased's house. He recognized 3 of those people as they hailed from the same village. They are the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> appellants. He also saw the 2<sup>nd</sup> and 4<sup>th</sup> appellants who were unknown to him.



- PW1 followed the 8 to the deceased's house whereupon he heard the chairman of the local motorcycle taxi, 'boda boda' group telling his brother that during the night he had been seen with 3 other men robbing someone of a motorcycle. The deceased denied the allegations, indicating that during that night he had been fishing.
3. Evidence was further adduced that when the deceased denied the allegation, the chairman of the 'boda boda' asked him to accompany him to the Chief's office where someone had been detained. The deceased then left with the 8 people. PW1 testified that two minutes later, his mother received a phone call from the area Chief informing her that her son was being killed in the field. PW1 immediately ran to the scene of the crime where he found a big crowd and the deceased's body swelling and bleeding. The deceased eventually died at the scene. PW1 called his uncle whom he also considered as a father and they reported the incident to the police.
  4. PW1's evidence was corroborated by Nicholas Otieno Odeny (PW2), another brother to the deceased. He gave testimony to the effect that on the material day and time he was in the farm when he saw a group of 5 people that he recognized enter the deceased's house and leave with him. He recognized the 5 because he would ride 'boda boda' with them. The 5 included Samuel Achiya Edan alias Waziri (DW1) who has since withdrawn his appeal and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> appellants. PW2 testified that a few minutes after the group of people had left, he heard his mother screaming and on his way to where his mother was, he met a cyclist who informed him that the deceased was being killed. On the way to the scene of the crime, he met some people fleeing. They included the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants. PW2 further indicated that when they found the deceased dead, they decided to go to the house of DW1 to find out what had happened to the deceased because he had been seen leaving with him. They, however, found DW1's house locked.
  5. Dickens Ojwang Alalo (PW3) an uncle to the deceased gave evidence that a day before the material date he was resting with the deceased at a Pub when PW4 approached them and informed them that DW1, a motorcycle rider, always carried his wife and he had left with his wife and children. The 3 of them decided to visit DW1 to check on the whereabouts of PW4's wife but they did not find her. The deceased left for his home thereafter. The following day at around 9am, PW3 was informed by his wife that the deceased had been killed by a 'boda boda' person. PW3 revealed that the 5<sup>th</sup> appellant had visited the deceased's home and told his mother that there was a small matter that they needed to sort out with the deceased, and soon thereafter the deceased was tied to a motorcycle and dragged along the road. He died at the junction of Sindo Girls.
  6. In support of the assertions by PW3, Nicholas Okinyi Ochieng (PW4) testified that on May 20, 2012 when he got home at around 5.30pm, he did not find his wife and 3 children. His 9-year-old son who had remained behind informed him that his wife and children had left with a motorcycle rider. PW4 then decided to visit DW1 at his home to find out the whereabouts of his wife. On his way he met PW3 and the deceased and they accompanied him to DW1's home. They, however, did not find his wife at DW1's house. PW4 further stated that the following day when he returned home from buying vegetable seedlings, he was informed by his children that some people had visited his home looking for him and they had left with a rading, which is a piece of wood that is used to crush millet. Later on, PW4 testified, he heard word that the deceased, PW3 and himself had robbed DW1 of his motorbike.
  7. Kennedy Opande Agao (PW5), the Chairman of Suba Youth Group testified that on the material day at about noon he was at Sindio stage when he received information that a certain boy had been killed. As he approached the scene of the crime, he met a group of villagers who said they were looking for DW1, and the 1<sup>st</sup> and 5<sup>th</sup> appellants, claiming that they were among the team of 'boda boda' who had killed the deceased. As the villagers were intent on revenge, PW5 decided to board a motorbike to DW1's



house before they could arrive. On arrival, he took DW1 and escorted him to the police station. On 22<sup>nd</sup> May 2012, he also arrested the 1<sup>st</sup> appellant and accompanied him to the police station.

8. Kennedy Ochieng Kamangar (PW6), a ‘boda boda’ operator, gave evidence that on the material day he was going to Sindo when he met a lady named Lagi Tiego who asked him why the ‘boda boda’ had beaten up the deceased. On the way to the scene of the incident, he also met the deceased’s mother and brother who also sought to know what the deceased had done. PW6 informed them that he was going to the scene to inquire. At the scene, he found the deceased lying on his stomach with his head facing to the right. There was a crowd of about 30 people surrounding him and when he asked them whether they had killed the deceased they responded in the affirmative stating that it was because he had stolen from DW1 who was also in the crowd. In the crowd, PW6 identified the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants. PW6 advised them to report the matter to the District Office.
9. Dr. Ayoma Ojwang (PW7), the Assistant Director of Medical Services working at Homa Bay District Hospital, explained that he conducted an autopsy on the deceased on 24<sup>th</sup> May, 2012 and found that the body had multiple bruises, large lacerations and cuts all over the body. There was also a large hematoma on the left side of his neck and at the anterior chest wall on the left side. Further, there was bleeding in the left lung, which had collapsed. The 6<sup>th</sup> and 7<sup>th</sup> ribs on the left side were fractured and there was massive scalp hemorrhage and bleeding into the brain. PW7 concluded that the cause of the deceased’s death was a head injury, left hemothorax and left lung collapse, and the probable type of weapon used was both sharp and blunt.
10. Grace Musumbi Ombima (PW8), the Assistant Chief for Suba West Sub-location testified that on the particular day at around 10.30am as she proceeded to the DO’s office for a meeting, she met members of the public who informed her that a person’s life was in danger. She called the Corporal for Administration Police of that location and informed him. On proceeding further for the meeting, she saw a group of about 50 ‘boda boda’ riders congregated, armed with crude weapons and surrounding the deceased who was lying on the ground. PW8 decided to call the Administration police for the second time to inform them of the incident. She also called the mother of the deceased who was known to her to apprise her.
11. Philip Kipchirchir (PW9), an Administration Police Constable attached to Sindo explained that on the material day he was on duty when he received a report from DW1 that at around 11.45pm on 20<sup>th</sup> May, 2012 he had been attacked by 3 men who wanted to rob him of his motorcycle but that upon raising an alarm the men escaped. DW1 had informed PW9 that he had identified one of the attackers but he did not disclose his name. PW9 recorded the report in the occurrence book and advised DW1 to wait for the duty corporal.
12. However, DW1 declined to heed that advice and left. Later, PW9 received information from the area chief that some ‘boda boda’ riders had arrested one person and he was in danger. His colleagues went to the scene of the crime while he was left at the station.
13. Inspector Stephen Kimunya (PW10), the investigating officer in the matter, testified that on the material day at about 11.00am he was in his office when he received a report of murder from Sindo AP Camp. He proceeded to the scene of the crime with other officers and found the body of the deceased lying on the road. He took photographs of the scene and visited the deceased’s home. PW10 further stated that at the scene of the incident lay two pieces of clubs ‘rungus’ and a piece of timber. He recorded statements of various witnesses and concluded that the appellants, including DW1 who withdrew his appeal, were connected to the offence. Subsequently the appellants were arrested.



14. When put on their defenses the accused persons gave sworn testimony in which they denied committing the offence. They called no witnesses. Samuel Achiya (DW1) stated that on the fateful day when he arrived at his place of work, he found his generator spoilt and he took it for repairs at Mbita. After the generator had been repaired he took it back to his work place and proceeded home for lunch. DW1 asserted that while at home, PW5 went and told him that he was required at Sindo AP Camp, and when they arrived at the Camp, PW5 told the policer officer present to lock him up in the cells.
15. Wycliff Otieno Onyango (DW2)'s testimony was that on the material day, he had gone to sell fish at Magunga market and he returned home on 22<sup>nd</sup> May, 2012. On his way back home, he met a group of people who had burnt something on the road. They stopped him and told him that they had cautioned motorbikes from passing through that road. The group perceived DW2 to have defied their order and they took him to the police station where he was arrested. Elvis Ochieng Mumbo (DW3) on the other hand stated that on the fateful day his mother sent him to buy medicine for cows and he called one of the motorbike riders to take him to the market. He claimed that on the way to the market, he asked the motorbike rider to allow him to ride the motorbike and he agreed. When they reached Sindo market, they were approached by police officers who sought to know who was riding the motor bike and the owner of the motor bike referred the police to him, at which point he was arrested.
16. Gabriel Otieno Anyango (DW4)'s testimony was that on the material day he went to work as usual and went back home in the evening. The following day he also went to work up to 10.00am when his generator ran out of fuel. He went to Sindo to fetch fuel and while at a fuel station he was asked by some people whether he knew Oketch Adeya, a question to which he responded in the negative. The same people then told him that there was an issue at the D. O's office which concerned him and so they urged him to go to the D. O's office and have the issue resolved. DW4 testified that when he got to the D. O's office, he was locked up in a cell.
17. Pius Owino Oginga (DW5) testified that on the fateful day he tilled his garden for the better part of the day before retiring to bed. The following day he also cultivated his garden up until 9.30am when he went to Sindo market. While almost at the market he met a group of people who had lit fire on the road. The group stopped him from passing through the road claiming that they had cautioned people against passing there. The people then took him to the police station where he was locked up.
18. Kennedy Ochieng Kisakwa (DW6) gave evidence to the effect that on the material day, he worked all day and on the following day went to Homa Bay Law Courts to testify in a case concerning him and a cousin to PW6. While seated at the customer care desk of the court waiting to be called to testify, PW6 and PW3 approached him and asked him if he could withdraw the case. DW6 told them to allow him to testify first then they would discuss that issue later. On 25<sup>th</sup> May 2012, PW6 went back to DW6 seeking to know his decision on the matter but DW6 told him to allow the court to decide the matter. DW6 claimed that on 14<sup>th</sup> June, 2012 when the case was next being heard, PW1, PW2 and PW6 again went to meet him in court. PW6 left PW1 and PW2 seated with DW6, only to reappear with a police officer who arrested him and took him to Homa Bay Police cells.
19. The testimony of Tom Otieno Apunda (DW7) was that on the fateful day he went fishing as usual and the following day one of his customers bought fish from him worth Ksh. 7000, undertaking to pay the money on April 23, 2013. On the day of payment, however, the customer failed to pay and they disagreed. That same day at around 5.30pm, the customer approached him with 2 police officers who arrested him and took him to the AP Camp at Sindo.



20. At the end of the hearing, the learned Judge (Majanja, J.) rendered a judgment on the April 24, 2015 wherein he found the prosecution's case proved to the required threshold, found the appellants guilty of the offence charged, convicted them and sentenced each to death.
21. The appellants are now before us on a first appeal. They raised six (6) grounds of appeal in a memorandum of appeal dated February 25, 2020. The grounds are that the learned trial Judge erred in both in law and fact by:-
  1. Making a finding that the appellants had murdered the deceased.
  2. Concluding that circumstantial evidence had been established to warrant conviction.
  3. Concluding that malice aforethought had been proved by the prosecution.
  4. Concluding the conduct of the appellants at the scene of the crime meant guilt.
  5. Concluding that the appellants had been identified.
  6. Sentencing the appellants to death.
22. At the plenary hearing, learned counsel, Mr. Bagada appeared for the appellants whereas the prosecution was represented by learned Prosecution counsel, Ms. Ombega. Both parties sought to rely on their written submissions. In the appellants' written submissions dated May 27, 2020, the appellants deny the finding by the learned judge that they murdered the deceased, arguing that the evidence of both PW1 and PW2, who allegedly saw them leave with the deceased from his house, did not reveal any threat or coercion having been used on the deceased. The appellants draw attention to the contradiction in the evidence of PW1, PW2 and PW3, to the effect that whereas PW1 saw the deceased leave in the company of 8 people, PW2 saw him leave with 5 people. PW3 on the other hand witnessed the deceased being tied on a motorbike and dragged by the 5<sup>th</sup> appellant. The appellants argue that this contradiction raises questions on how exactly the deceased met his death and the identity of the people who were involved.
23. The appellants fault the learned Judge for concluding that they, in concert with fellow 'boda boda' riders, murdered the deceased. They contend that the evidence of PW8, who stated that she saw the deceased being surrounded by 50 'boda boda' persons who were armed with crude weapons never revealed that the 'boda boda' people beat up the deceased.
24. On the ground that the learned Judge erred by concluding that circumstantial evidence had been established to warrant conviction, the appellants assert that no evidence was adduced to demonstrate that they participated in killing the deceased and neither were there facts to warrant a conclusion of common intention between the appellants and the perpetrators of the crime. Moreover, it is contended, the learned Judge misdirected himself by concluding that by the appellants taking the accused towards the chief's camp they were delivering him to be murdered.
25. The appellants next question the fact that whereas PW6 indicated that he found the killers at the scene of the crime and even talked to them, PW1 and PW2 claimed not to have seen the appellants at the scene yet they arrived there at the same time as PW6. With respect to the ground that the learned judge erred by concluding that malice aforethought had been proved by the prosecution, it was urged that no evidence was adduced by the prosecution to show that the appellants who were seen by the prosecution witnesses were amongst the mob that killed the deceased and neither was it shown that they were connected to the said mob. Further, the learned Judge failed to consider the evidence of PW1 who stated that he heard the deceased being told that he was being taken to the chief's office because of being suspected to have been involved in some theft and the direction they took was that of going to



the chief's office. Moreover, it is submitted, PW2 stated that the deceased walked behind the appellants which shows that there was no threat whatsoever upon the deceased. To the appellants, therefore, no malice could be inferred against them.

26. On the question of whether the appellants had been properly identified, it is submitted that the learned Judge erred in concluding that the case being a case of recognition rather than identification, there was no room for a mistake, for the reason that PW1 and PW2 were not able to corroborate each other's evidence on the number and identity of persons they saw at the scene. For this proposition the appellants rely on the decision in *R Vs. Turnbull* [1976] 3 ALL ER 549 at page 552 where the court observed that even where a witness purports to recognize someone whom they know, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
27. The appellants next contend that in view of the Supreme Court's decision in Petition No. 16 of 2015, *Francis Karioko Muruatetu & Another Vs. Republic & Others* [2017] eKLR (Muruatetu 1), the learned Judge ought to have considered their mitigation and sentenced them to a lesser penalty than that of death. In addition, they pointed out that following the withdrawal by one of the appellants of his appeal in Kisumu Criminal Appeal No. 131 of 2015, in favour of filing a petition pursuant to the Supreme Court's directions in Muruatetu 1. Subsequently the court in Homabay High Court Criminal Petition No. 14 of 2016, *Samuel Achiya Eddan alias Waziri Vs. Republic* [2020] eKLR, considered the petitioner's mitigation and reduced his sentence to a term of 10 years imprisonment from the date of the sentence. They urge that in the event we uphold their conviction, we should consider their mitigation herein and similarly reduce their sentence to 10 years.
28. In response to the appellants' submissions, Ms. Ombega learned counsel for the respondent expressed her opposition to the appeal, relying on the record and their submissions, contending, in sum, that the appellants were properly convicted and punished.
29. This is a first appeal. It is therefore our duty and obligation to re-evaluate and re-analyze the evidence that was adduced in the court below to enable us reach our own conclusions on the matter. Alive to this duty, we have gone to great detail to set out the evidence earlier in this judgment. In discharge of our duty, we are required to bear in mind that we did not had the opportunity of observing or hearing the witnesses give evidence and observe the manner and demeanour of the said witnesses. See *Okeno Vs. Republic* [1973] EA 32 wherein the predecessor of this Court had this to say:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (*Pandya versus Republic* (1957) EA 330 and to the appellate courts our decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M'Ruwela versus Republic* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings would be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See *Peters Versus Sunday Post* [1958] EA 424"
30. We note that from the outset the learned Judge outlined the ingredients of the offence of murder that the prosecution must prove beyond reasonable doubt, as prescribed by the Penal Code, Chapter 63 of the Laws of Kenya. The ingredients are;
  - a. Proof of the fact and the cause of death of the deceased.



- b. That the cause of the deceased's death was as a result of or the direct consequence of the accused's unlawful act or omission.
  - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the Penal Code.
31. The learned Judge proceeded to find that the fact and cause of death was certified by Dr. Ayoma Ojwang (PW7), the Assistant Director of Medical Services working at Homabay District Hospital who upon conducting an autopsy on the deceased, described the nature of injuries he had suffered, and the cause of his death. PW7 certified the death and observed that the injuries were probably inflicted by sharp and blunt objects. In the result, the learned Judge found, just as we do in this appeal, that there was no dispute as to the fact and cause of death.
  32. The next issue that arose was whether there was proof that it is the appellants who killed the deceased and if so, whether they did so with malice aforethought. Essentially, the learned Judge noted that this was a case concerning circumstantial evidence as no one saw the appellants assault the deceased. He went further and considered the principles applicable in cases where circumstantial evidence is relied on to found a conviction, primarily that, 'the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt', See *Kariuki Karanja Vs. Republic* [1986] KLR 190.
  33. The appellants reject the holding that they murdered the deceased arguing that the evidence of PW1 and PW2 who saw them leave with the deceased did not show that they occasioned any threat or coercion on him. Further, the contradictions in the testimonies of PW1, PW2 and PW3, where they gave a different figure of the number of persons that they saw at the deceased's home on the fateful day, and how he met his death, raise doubt as to how exactly the deceased died and who was involved.
  34. With regard to the alleged contradictions in the evidence of PW1, PW2 and PW3, the approach that we are obligated to take in assessing such evidence is that laid down by the Court in *Njuki & 4 Others Vs. Republic* [2002] IKLR 771 where the Court made observations thus: -
 

In certain criminal cases, particularly those which involve many witnesses, 'discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused, if so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.' (at P. 782)
  35. See also *Joseph Maina Mwangi Vs. Republic* Criminal Appeal No. 73 of 1993 where this Court held thus: -
 

In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording in section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."
  36. In light of the foregoing principles, it is our view that the contradictions in the evidence of PW1, PW2, and PW3 as to the persons last seen with the deceased and their number are inconsequential to the conviction and sentence of the appellants. This observation is further fortified by the finding of the learned Judge, with which we agree, that PW1 and PW2 gave credible testimonies to the effect that the



appellants went to the home of the deceased and left with him. A few minutes later the deceased was attacked by a mob. PW1 and PW2 also recognized the appellants as part of the community of *'boda boda'* riders. PW6 further confirmed seeing the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 6<sup>th</sup> appellants at the scene of the crime. In the circumstances, the learned Judge surmised, properly so, that there was no room for mistaken identity.

37. With regard to the existence of circumstantial evidence pointing irresistibly to the culpability of the appellants in the murder of the deceased, the learned Judge observed that the appellants are the persons who left with the deceased from his home and a few minutes later he was found dead, not so far from his home. The appellants are therefore the people that 'set in motion the chain of events that led to the death of the deceased', affirmed the learned Judge, further noting that his reasoning was buttressed by the motive of the appellants in the matter, which was established by the prosecution. The learned Judge went ahead and described the facts that established the motive of the appellants including that, the deceased, PW3 and PW4 went to see DW1 to inquire whether he had taken PW4's wife. PW1 indicated that when the appellants went to pick the deceased, they accused him of stealing a motorcycle. PW9 testified that DW1 had made a report at the AP Post a day before the incident that he had been attacked by 3 men who wanted to steal his motorcycle. To the learned Judge, this evidence led to the conclusion that DW1 had sought vengeance against the deceased by working in concert with fellow 'boda boda' riders to deliver the deceased to a mob that killed him. On analyzing the evidence and the law, the learned Judge deduced thus;

The circumstantial evidence inextricably points to the accused as the people who caused the death of the deceased with malice aforethought. There is no other explanation for the death of the deceased other than the chain of events triggered when the accused took the deceased from his home on the morning of 21<sup>st</sup> May 2012 and took him to his death at Sindo Market where they knew he would be subjected to grievous harm or death. I therefore hold that the prosecution has proved its case beyond reasonable doubt."

38. We agree with the learned Judge, on our own assessment of the evidence, that all the above circumstantial evidence unerringly pointed to the guilt of the appellants and, when taken cumulatively, forms a chain so complete that there was no way the appellants could possibly have escaped from the conclusion that in a joint enterprise, they triggered the series of actions that led to the death of the deceased.
39. The last ground of appeal is whether the appellants' sentence should be reduced in light of the Apex Court's decision in *Muruatetu I* (supra) that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. The appellants further contend that in light of Criminal Petition No. 14 of 2016, *Samuel Achiya Eddan alias Waziri Vs Republic* [2020] eKLR, wherein one of the appellants, (DW1), petitioned the High Court following the decision in *Muruatetu 1* and the court, after considering his mitigation, reduced his sentence to 10 years imprisonment, this Court should also consider their mitigation herein and reduce their sentence to 10 years.
40. Indeed, this Court has adopted the reasoning of the Supreme Court in *Muruatetu 1* and reduced various mandatory sentences on merit. However, while we take cognisance of the mitigation of the appellants, particularly that they are in the prime of their life, it must not be lost that they took part in the commission of a heinous act. The growing trend of lionisation of impunity endemic in the 'boda boda' sub-culture must be stopped. Boda boda operators must not be a law unto themselves gleefully and with impunity erecting a jungle of lawlessness. And courts of law must firmly pronounce themselves in this regard. The appellants, though young, must face the full force of the law. They too are



and must be accountable like everyone else. Moreover, we are not bound by the High Court's decision in Criminal Petition No. 14 of 2016, Samuel Achiya Eddan alias Waziri Vs. Republic [2020] eKLR. We think that the aggravating circumstances in the case far outweigh the mitigations of youthfulness and remorse, and they deserve a stiffer sentence than that of 10 years the appellants seek to persuade us to impose.

41. In the result, all things considered, this appeal succeeds on sentence only. We set aside the sentence of death and substitute therefor with a term of twenty (20) years imprisonment to run from the date the appellants were first sentenced.

42. Order accordingly.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> 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**

