



**Anyere v Republic (Criminal Appeal 74 of 2020)
[2025] KECA 2276 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2276 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 74 OF 2020
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
DECEMBER 19, 2025**

BETWEEN

ROBERT MASINDE ANYERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kakamega (R. N. Sitati & Njoki Mwangi, JJ.) dated 10th March 2016 in HCCRA No. 166 of 2014)

JUDGMENT

1. This is a second appeal arising from the conviction and sentence of the appellant, Robert Masinde Anyere, on two counts of robbery with violence contrary to section 296(2) of the Penal Code.
2. The appellant was charged before the Principal Magistrate's Court at Butali in Criminal Case No. 54 of 2013. It was alleged that on 15th January, 2013 at Cheboso village, Kakamega County, jointly with another not before the court, while armed with offensive weapons, namely axes, pangas and iron bars robbed Kenneth Khalisa of two mobile phones make Samsung and LG valued at Kshs.2,500/= and Kshs.2,500/= and immediately before or after the time of such robbery, wounded the said Kenneth Khalisa.
3. In count II, the particulars were that on 15th January 2013 at Cheboso village in Kakamega North District of the Kakamega County, jointly with others not before the Court, while armed with offensive weapons namely axes, pangas and iron bars robbed Jonah Alusiola Lwoyelo of cash Kshs.1,600/= and one mobile phone make Nokia E-2 valued at Kshs.5,000/= and immediately before the time of such robbery wounded the said Jonah Lusiola Lwoyelo.
4. The appellant also faced an alternative charge to count II, namely handling stolen property Contrary to Section 322(1)(2) of the Penal Code it being alleged that on the 17th January 2013 at Cheboso Primary



School, Cheboso village in Kakamega County otherwise than in the course of stealing dishonestly retained one mobile phone make NOKIA E-2 knowing or having reason to believe it to have been stolen property.

5. Upon a full trial, the learned trial magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant, and sentenced him to death as prescribed under section 296(2) of the Penal Code on both counts, although the sentence on count II was held in abeyance.
6. Aggrieved, the appellant preferred an appeal to the High Court at Kakamega in Criminal Appeal No. 166 of 2014. The High Court (Sitati, & Mwangi, JJ.) re-evaluated the evidence and dismissed the appeal, affirming both conviction and sentence.
7. Still dissatisfied, the appellant lodged this second appeal to this Court against the sentence only, on grounds that the learned judges erred both in law and fact in failing to appreciate that the he was entitled to the rights set out under Article 29 of *the Constitution* including the right not to be treated or punished in a cruel, inhuman or degrading manner.
8. In his written submissions as well as the supplementary submissions, the appellant draws from the case of Francis Karioko Muruatetu & Another v Republic (2017) eKLR to argue that the decision declared the mandatory death sentence unconstitutional as it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case, having regard to the circumstances of each case.
9. Secondly, that the mandatory nature of the death sentence also denied the convicted person the opportunity to present their plea in mitigation before being sentenced). The appellant urges us to consider what he said in mitigation; and adopt the Judiciary Sentencing Policy Guidelines (2016), so as to tamper with the sentence.
10. The respondent on the other hand, through the written submissions filed by learned prosecution counsel, Ms. Busienei, urges us not to interfere with the sentence, pointing out that the circumstances where an appellate court can interfere with the sentence of the trial court were well quoted in Nillson v Republic [1970] E.A 599 following the reasoning of the court in Ogalo s/o Owuora v Republic [1954] 21EACA 270 as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershecity (1912) C.CA 28 T.LR 364.”

11. It is further submitted that the appellant, has challenged the constitutionality of his sentence and his rights under Article 29 of *the constitution*, for the first time on second appeal before this court, as it was not raised in the High Court in the first instance; that the Supreme Court in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR), was clear that this Court is deprived of jurisdiction to consider a matter which was not first raised at the High Court; therefore the appellant cannot now raise this issue before this court for the first time.



12. Counsel also points out that Section 296(2) of the Penal Code prescribes the death penalty as the sentence for the crime of robbery with violence; which is lawful and is still applicable as a discretionary maximum punishment, as per the directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)*. We submit, the trial court had the opportunity to hear the mitigation of the Appellant in court and applying its discretion was convinced that the death penalty was the most appropriate under the circumstances.
13. This being a second appeal, the Court's jurisdiction is circumscribed. Section 361(1)(a) of the Criminal Procedure Code provides that a second appeal lies on matters of law only. The guiding principle was aptly set out in *Samuel Warui Karimi v Republic [2016] eKLR* as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong v R [1984] KLR 611*.”
14. Having carefully considered the record of appeal, the submissions of both parties, and the applicable law, the only issue for determination is whether the sentence was lawful.
15. The appellant was sentenced to death as provided for under section 296(2) of the Penal Code which he complains to be unconstitutional pursuant to the holding in *Francis Karioko Muruatetu and Another v Republic [2016] eKLR*, popularly referred to as *Muruatetu 1*. However, the Supreme Court of Kenya in *Petition No. 15 and 16 (Consolidated) of 2015. Francis Karioko Muruatetu & Another v Republic & Others [2015] eKLR [2021] KESC 31 (KLR) (6 July 2021) (Directions)* commonly referred to as *Muruatetu 2* the Court gave directions, inter alia:
 4. By our judgment rendered on December 14, 2017, this court (though differently constituted), readily accepted that the last two questions (b) and (c) above, not having been canvased before the two courts below, were not available for the court's determination. On the first question, however, the court made the following declarations and orders:

"a) The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26(3) of *the Constitution*."
16. The Supreme Court in *Muruatetu 2* clarified that its earlier decision declaring the mandatory death penalty unconstitutional applies only to murder cases under section 204 of the Penal Code. In respect of robbery with violence under section 296(2), the Court expressly held that the death penalty remains the only sentence prescribed in law. Accordingly, the trial court and the High Court imposed the only lawful sentence available, and this Court has no jurisdiction to interfere with it.
17. In view of the foregoing, we are satisfied that there is no error of law in the concurrent findings of the trial court and the High Court on sentence. Indeed, the appellant's sentence was lawful and we uphold it. Consequently, the appeal lacks merit and is dismissed.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

